149US364

RECORD, CASE No. 13,850.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 240.

THE MINNEAPOLIS AND ST. LOUIS RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

HENRY G. EMMONS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

FILED OCTOBER 21, 1889.

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1 STATE OF MINNESOTA, }
County of Freeborn. }

District Court, Tenth Judicial District.

HENRY G. EMMONS, Plaintiff,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, Defendant.

You will please take notice that the plaintiff above named appeals to the supreme court of the State of Minnesota from the order of this court in this action, entered on the 19th day of February, 1886, denying said plaintiff's motion for a new trial in said cause.

Dated February 26th, 1886.

LOVELY, MORGAN & MORGAN,
Attorneys for Plaintiff.

To J. D. Springer, Esq., attorney for defendant, and George T. Gardner, Esq., clerk of the district court.

STATE OF MINNESOTA, }
County of Freeborn, } *ss:*

Henry Morgan came before me, and, being by me first duly sworn, on his oath deposes and says that he is one of the attorneys for the plaintiff in the above-entitled action; that he did, on the 4th day of March, A. D. 1886, at Albert Lea, Minnesota, deposit in the post office a true and correct copy of the within notice of appeal enclosed in an envelope and prepaid postage thereon and directed to J. D. Springer, attorney for said defendant, at Minneapolis, Minnesota, the place of residence of said attorney, there being regular daily communication by mail between said points.

HENRY MORGAN.

2 Subscribed and sworn to before me this 4th day of March, A. D. 1886.

GEO. T. GARDNER,
Clerk of Dist. Court.

Due service of the within notice of appeal is hereby admitted at Albert Lea, Minn., the 4th day of March, 1886.

GEO. T. GARDNER,
Clerk of the Dist. Court.

Filed March 4th, 1886.

GEO. T. GARDNER,
Clerk of Dist. Court.

3 STATE OF MINNESOTA, }
County of Freeborn. }

District Court, Tenth Judicial District.

HENRY G. EMMONS, Plaintiff,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, Defendant.

Whereas the plaintiff in the above-entitled action appeals to the supreme court of the State of Minnesota from the order of said court denying said plaintiff's motion for a new trial in said cause and entered herein on the 19th day of February, 1886:

Now, therefore, we, Henry G. Emmons, principal, and G. Gulbrandson, as surety, do undertake, promise, and agree to and with said defendant that said plaintiff shall pay all costs and charges that may be awarded against him on such appeal and any damages which said defendant may sustain in consequence thereof if said order or any part thereof is affirmed or said appeal dismissed and abide and satisfy the order which said appeliate court may make or give therein.

Conditioned, however, that our liability shall not exceed the sum of one hundred and fifty ($150.00) dollars.

Dated this 26th day of February, 1886.

H. G. EMMONS. [SEAL.]
G. GULBRANDSON. [SEAL.]

Signed, sealed, and delivered in presence of—
HENRY A. MORGAN.
D. F. MORGAN.

STATE OF MINNESOTA, } ss:
County of Freeborn, }

Be it known that on this 26th day of February, A. D. 1886, before me personally appeared H. G. Emmons and G. Gulbrandson, to me known to be the same persons described in and who executed
4 the foregoing undertaking, and each for himself acknowledged the same to be his own free act and deed.

[NOTARY SEAL.] HENRY A. MORGAN,
Notary Public, Freeborn Co., Minn.

5 STATE OF MINNESOTA, } ss:
County of Freeborn, }

F. Gulbrandson, the person named in and who executed the foregoing undertaking, being first duly sworn, doth for himself depose and say that he is a resident and freeholder of the State of Minnesota and worth the amount of one hundred and fifty ($150) dollars above his debts and liabilities and exclusive of his property exempt from execution.

G. GULBRANDSON.

Subscribed and sworn to before me this 26th day of February, A. D. 1886.

[NOTARY SEAL.] HENRY A. MORGAN,
Notary Public, Freeborn Co., Minn.

STATE OF MINNESOTA, } ss:
County of Freeborn, }

Henry Morgan came before me and, being first duly sworn, on his oath deposes and says that he is one of the attorneys for the plaintiff in the above-entitled action; that on the 4th day of March, 1886, he deposited a copy of the within undertaking on appeal in the post office at Albert Lea, Minnesota, the place of residence of said plaintiff's attorneys, enclosed in an envelope with postage prepaid and directed to J. D. Springer, Minneapolis, Minnesota, the place of residence of said J. D. Springer, the attorney for said defendant, there being daily communication between said points by mail.

HENRY MORGAN.

Subscribed and sworn to before me this 4th day of March, A. D. 1886.

[SEAL.] GEO. T. GARDNER,
Clerk of the District Court.

The within undertaking and the sureties therein *and* hereby approved this 27th day of February, 1886.

JOHN Q. FARMER,
District Judge.

Filed March 4th, 1886.

GEO. T. GARDNER,
Clerk of the District Court.

6 STATE OF MINNESOTA, } ss:
Freeborn County, }

District Court.

HENRY G. EMMONS, Plaintiff,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, Defendant.

This is an action brought by the plaintiff in the district court for Freeborn county to recover damages resulting to him by reason of the failure of defendant to build and maintain fences on each side of its road as the same is located on and over plaintiff's farm, in said Freeborn county, and to build cattle-guards where said road enters and leaves plaintiff's said premises.

The following is the case and bill of exceptions therein, to wit:

Said cause, being upon the calendar for trial at the November, 1885, term of said court, came on for trial before Hon. John Q. Farmer, judge of said court, and a jury duly empanelled therein, when the following proceedings were had in said cause: It was

3 STATE OF MINNESOTA, }
County of Freeborn. }

District Court, Tenth Judicial District.

HENRY G. EMMONS, Plaintiff,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, Defendant.

Whereas the plaintiff in the above-entitled action appeals to the supreme court of the State of Minnesota from the order of said court denying said plaintiff's motion for a new trial in said cause and entered herein on the 19th day of February, 1886:

Now, therefore, we, Henry G. Emmons, principal, and G. Gulbrandson, as surety, do undertake, promise, and agree to and with said defendant that said plaintiff shall pay all costs and charges that may be awarded against him on such appeal and any damages which said defendant may sustain in consequence thereof if said order or any part thereof is affirmed or said appeal dismissed and abide and satisfy the order which said appeliate court may make or give therein.

Conditioned, however, that our liability shall not exceed the sum of one hundred and fifty ($150.00) dollars.

Dated this 26th day of February, 1886.

H. G. EMMONS. [SEAL.]
G. GULBRANDSON. [SEAL.]

Signed, sealed, and delivered in presence of—
HENRY A. MORGAN.
D. F. MORGAN.

STATE OF MINNESOTA, } *ss:*
County of Freeborn, }

Be it known that on this 26th day of February, A. D. 1886, before me personally appeared H. G. Emmons and G. Gulbrandson, to me known to be the same persons described in and who executed
4 the foregoing undertaking, and each for himself acknowledged the same to be his own free act and deed.

[NOTARY SEAL.] HENRY A. MORGAN,
Notary Public, Freeborn Co., Minn.

5 STATE OF MINNESOTA, } *ss:*
County of Freeborn, }

F. Gulbrandson, the person named in and who executed the foregoing undertaking, being first duly sworn, doth for himself depose and say that he is a resident and freeholder of the State of Minnesota and worth the amount of one hundred and fifty ($150) dollars above his debts and liabilities and exclusive of his property exempt from execution.

G. GULBRANDSON.

Subscribed and sworn to before me this 26th day of February, A. D. 1886.

[NOTARY SEAL.] HENRY A. MORGAN,
Notary Public, Freeborn Co., Minn.

STATE OF MINNESOTA, } ss:
County of Freeborn, }

Henry Morgan came before me and, being first duly sworn, on his oath deposes and says that he is one of the attorneys for the plaintiff in the above-entitled action; that on the 4th day of March, 1886, he deposited a copy of the within undertaking on appeal in the post office at Albert Lea, Minnesota, the place of residence of said plaintiff's attorneys, enclosed in an envelope with postage prepaid and directed to J. D. Springer, Minneapolis, Minnesota, the place of residence of said J. D. Springer, the attorney for said defendant, there being daily communication between said points by mail.

HENRY MORGAN.

Subscribed and sworn to before me this 4th day of March, A. D. 1886.

[SEAL.] GEO. T. GARDNER,
Clerk of the District Court.

The within undertaking and the sureties therein *and* hereby approved this 27th day of February, 1886.

JOHN Q. FARMER,
District Judge.

Filed March 4th, 1886.

GEO. T. GARDNER,
Clerk of the District Court.

6 STATE OF MINNESOTA, } ss:
Freeborn County, }

District Court.

HENRY G. EMMONS, Plaintiff,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, Defendant.

This is an action brought by the plaintiff in the district court for Freeborn county to recover damages resulting to him by reason of the failure of defendant to build and maintain fences on each side of its road as the same is located on and over plaintiff's farm, in said Freeborn county, and to build cattle-guards where said road enters and leaves plaintiff's said premises.

The following is the case and bill of exceptions therein, to wit:

Said cause, being upon the calendar for trial at the November, 1885, term of said court, came on for trial before Hon. John Q. Farmer, judge of said court, and a jury duly empanelled therein, when the following proceedings were had in said cause: It was

admitted by defendant that the plaintiff has been and still is the owner of the lands and premises described in the complaint, and ever since the location of defendant's road over and across the same in 1879 has been in the use and occupancy of said premises, as therein alleged. It was also admitted that defendant is a railway corporation created by and organized under and pursuant to an act of the legislative assembly of the then Territory of Minnesota entitled "An act to incorporate the Minnesota Western Railway Company," approved March 3rd, 1853, and the acts amendatory thereof,

7 and that in 1879 it constructed its road on and across plaintiff's said premises, and has ever since said date maintained and operated the same daily for the running of cars thereon and has not up to the time of the commencement of this action built or caused to be built fences or cattle-guards, as alleged in said complaint.

Thereupon defendant, by its counsel, objected to the admission of any evidence to prove the injury and damage alleged and set forth in the complaint, the allegations of which respecting said injuries and damages, are as follows—that is to say, "that heretofore, to wit, on the 16th day of October, 1879, and for a long time prior thereto, the said plaintiff was the owner and seized in fee simple of the following-described land and real estate situated in the county of Freeborn and State aforesaid, to wit, the southeast quarter of the southeast quarter of section thirty-two (32), township one hundred and one (101), and range twenty-two (22) west.

"That except, as hereafter stated, said land was then and ever since has been owned and occupied by said plaintiff as a farm and homestead by himself and family, and at all of said times has been kept and maintained by him under cultivation for farming purposes and was properly enclosed by a lawful fence, and he further alleges that said farm was useful for the purpose of raising stock, and that at, prior to, and ever since said time said plaintiff was and has been the owner of a large number of horses, cattle, and other live stock which he raised and cared for upon his said farm.

"That on said 16th day of October, 1879, the said plain-

8 tiff sold and conveyed in fee simple to said *plaintiff* for its right of way over and across said land the following-described piece or parcel of land, to wit: A strip of land one hundred (100) feet in width, the same being fifty (50) feet in width on each side of the center line of the Minneapolis & St. Louis railway where the same is now located over and across the southeast quarter of the southeast quarter of section thirty-two (32), in township one hundred and one (101), of range twenty-two (22).

"That on and ever since said last-named day said defendant has occupied said land so purchased of said plaintiff as and for its right of way, over which it laid its track and has daily thereafter continued to run its engines, locomotives, and trains of cars over and across the same.

"Plaintiff further alleges that at all the times hereinafter set forth at the places where said railroad enters and leaves his farm a public highway for wagons and teams ran and now runs along and past

the said farm and adjoining the same on the east and south sides thereof, which said highway was and ever since has been crossed by said railroad.

"Said plaintiff further alleges that that for six months previous to said 16th day of October, 1878, said railroad has been built over and across said premises, but that the said defendant did not then nor has it since built or maintained any lawful fence or any fence whatever on each or either side of its said railroad and between the land so occupied by it for right of way and the premises of said plaintiff, and has not built or maintained any cattle-guards where said railroad enters and leaves said land at the said public
9 highway and wagon crossings, but that the said highway and wagon crossing and said farm have been left open during all of said time, and said defendant in said respects has run and operated its said road, contrary to the laws of this State, over and across said land by neglecting to fence the sides of said railroad and to build said cattle-guards at said crossings, to his great injury and annoyance during all of said time, whereby said plaintiff has been compelled to spend a great deal of time and money in watching his cattle and stock to prevent them from being killed and injured by the trains and engines of said defendant, and has been deprived of the free and beneficial use, occupation, and enjoyment of his said farm by reason of said defendant's unlawful use of that part of its railroad which crosses the same as aforesaid, which said unlawful use by said defendant has greatly diminished the value of its use and occupation by plaintiff, and has totally destroyed its value for the purpose of raising stock thereon, and has greatly hindered and delayed plaintiff in carrying on his said farm, whereby he has sustained damages in the sum of $1,000.00.

And the said court then and there sustained said objection on the ground that the said complaint does not state facts sufficient to constitute a cause of action and dismissed said action, to which ruling the plaintiff duly excepted.

The allegations of the complaint as to the injury and damage were put in issue by the answer.

It is hereby agreed that the above and foregoing may be signed, settled, and allowed by the judge of said district court as the settled case and bill of exceptions in the above-entitled cause without further notice.

LOVELY, MORGAN & MORGAN,
Attorneys for Plaintiff.

10 The foregoing con*a*tins all the evidence offered or -eceived in the above-entitled case, and, having by me been examined and found conformable to the truth, it is hereby settled and allowed as and for the settled case and bill of exceptions in the above-entitled action on the plaintiff's motion for a new trial herein.

JOHN Q. FARMER,
Judge 10th Judicial Dist., Minn.

In District Court.

STATE OF MINNESOTA, }
County of Freeborn. }

HENRY G. EMMONS, Plaintiff,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, Defendant.

To the above-named defendant and to J. D. Springer, Esq., attorney for said defendant:

GENTLEMEN: Take notice that the plaintiff in the above-entitled action will move for a new trial herein before the Hon. John Q. Farmer, judge of said court, at chambers, in the village of Spring Valley, Minnesota, on the 19th day of February, A. D. 1886, at nine o'clock in the forenoon, on the ground and for the reason following, to wit:

Error in law occurring at the trial and excepted to by the plaintiff.

You will further take notice that the said motion will be made upon the settled case and bill of exceptions herein.

Yours respectfully,

LOVELY, MORGAN & MORGAN,
Attorneys for Plaintiff.

11 STATE OF MINNESOTA:

In District Court, County of Freeborn.

HENRY G. EMMONS, Plaintiff,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, Defendant.

It is hereby stipulated and agreed by *the* between the attorneys for the respective parties herein that the motion for a new trial in said cause may be submitted to and heard by the judge of said court at chambers, in the village of Spring Valley, Minnesota, on the 19th day of February, A. D. 1886, at ten o'clock in the forenoon, without further notice.

Dated February 2nd, A. D. 1886.

LOVELY, MORGAN & MORGAN,
Attorneys for Plaintiff.
J. D. SPRINGER, *Attorney for Defendant.*

STATE OF MINNESOTA:

In District Court, County of Freeborn.

HENRY G. EMMONS, Plaintiff,
vs.
TH- MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, Defendant.

This cause came on to be heard to the court at chambers, in the village of Spring Valley, Minnesota, on this 19th day of February, A. D. 1886, on the motion of the plaintiff for a new trial herein.

Messrs. Lovely, Morgan & Morgan appeared as attorneys for said plaintiff, and J. D. Springer, Esq., appeared as attorney for said defendant.

After hearing the arguments of the respective counsel and duly considering the same it is hereby ordered that said motion be, and the same is hereby, *is* denied.

Dated February 19th, A. D. 1886.

JOHN Q. FARMER,
District Judge.

Filed Feb. 27th, 1886.
GEO. T. GARDNER,
Clerk of the District Court.

12 STATE OF MINNESOTA:

District Court, County of Freeborn.

I, Geo. T. Gardner, clerk of the district court within and for the aforesaid county and State, do hereby certify that the foregoing is a true and correct copy of the settled case and bill of exceptions in the foregoing-entitled cause, and the same is a carefully compared and a correct copy of the original which is on file in my office.

In testimony whereof witness my hand and the seal of said court, at Albert Lea, Minn., this 4th day of March, A. D. 1886.

(Signed) GEO. T. GARDNER,
[SEAL.] *Clerk of Dist. Court, Freeborn Co., Minn.*

13 [Endorsed:] 4475. State of Minnesota. Supreme court. Henry G. Emmons, app't, — The M. & St. L. R'y Co., resp't. Return on appeal. Filed M'ch 20th, 1886. Sam. H. Nichols, clerk.

14 STATE OF MINNESOTA:

Supreme Court, April Term, 1886.

HENRY G. EMMONS, Appellant,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, Respondent.

Assignment of Errors and Appellant's Points and Authorities.

Lovely, Morgan & Morgan, attorneys for appellant.

15 STATE OF MINNESOTA:

Supreme Court, April Term, 1886.

HENRY G. EMMONS, Appellant,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, Respondent.

Assignment of Errors.

I. The court erred in dismissing the action on the ground that the facts stated in the complaint do not constitute a cause of action.

16 *Appellant's Points and Authorities.*

But two questions are presented on this appeal, viz. (1), whether a railway company operating its road in violation of the laws of the State which require it to fence its track and construct cattle-guards is liable to an adjoining owner through whose cultivated lands the road is built for the damages which the latter suffers in the depreciation of the value of the use of such lands by reason of the absence of such fences and cattle-guards; and, if so (2), what is the true measure of such owner's damages.

I.

In the present case the defendant owns the land on which its track is situated, but the duty to fence is in no way affected by that fact.

Thompson on Negligence, 518.
Toledo, etc., R'y Co. *vs.* Pence, 68, Ill., 255.

Hence the case depends upon the extent of the liability created by Gen. St., 1878, chap. 34, sec. 54–57.

In Watier *vs.* Chicago, etc., R'y Co., 31 Minn., 91–93, this court say: "By the provisions of the statute in question the legislature have imposed an absolute and affirmative duty upon them to
17 fence against cattle generally, making them liable to all persons who suffer damage by reason of their neglect or failure to do so."

Again, in Savage *vs.* C., M. & St. P. R'y Co., *id.*, 419, it is said: "The Minnesota statute is, however, very broad. The omission to fence is negligence *per se* and the company is made liable for all damage sustained by any person in consequence of such failure or neglect." See also—

Nelson *vs.* C., M. & St. P. R'y Co., 30 Minn., 74.
Maher *vs.* Winona, etc., R'y Co., 31 Minn., 401.

It is also settled that "the liability is not limited to one for damages to domestic animals, but it is a liability for all damages to person or property which are sustained by any person in consequence of such failure or neglect."

Fleming *vs.* R'y Co., 27 Minn., 111–115.
Gillam *vs.* Sioux City, etc., R'y Co., 26 Minn., 268.
Quackenbush *vs.* R'y Co., 22 N. W. Rep., 519.

Applying the doctrine so firmly established by the above authorities, that defendant is liable for all damages which are the natural and proximate result of the operation of its road in violation of the statutory duty to fence, to the present case, it is clear beyond all doubt that plaintiff has suffered injury and damage in the
18 depreciation of the value of the use of his farm for which the law will afford him compensation.

McAffee *et al. vs.* Crofford, 13 How. (U. S.), 446.

It appears from the settled case that for many years plaintiff has resided upon and cultivated a farm in this county, along the east and south sides of which is located a public highway. The farm, which was devoted to general farming purposes and to raising stock, was at the time of the construction of defendant's road enclosed by a lawful fence.

It also appears that in 1879 defendant, having acquired the right of way by purchase from plaintiff, constructed its road across the farm and has ever since maintained and operated the same without constructing fences or cattle-guards as provided by law, and that by reason of such failure the value of the use of the farm has been and is greatly depreciated, and that he has been compelled to expend time and money to protect his crops from destruction and his cattle from straying onto defendant's road, where they were in imminent danger of injury from passing trains; yet the trial court refused to admit proof of such damages and held as matter of law that they did not result from the failure to fence, and hence were not recoverable in this action, which ruling we submit was clearly erroneous.

It will hardly be contended that if defendant by its negligence should flood plaintiff's land or scatter fire from its locomotives and thus depreciate the value of the use of his farm or injure him in any other property right it would not be liable, and no distinc-
19 tion exists between such a case and this, where the damages results from the commission of an act which the law defines as negligence *per se*.

Wood's Law of Nuisances, secs. 138, 284, '5, '6.
2 Thompson's Negligence, 1232.

It was suggested by the trial court in disposing of the motion to dismiss that plaintiff should have protected himself against loss from defendant's misconduct by building the fence himself. We readily concur in the doctrine, properly limited, that the party injured should make reasonable exertions to render the injury as light as possible, and if by his negligence or willfulness he allows the damages to be unnecessarily enhanced the increased loss, which was avoidable by the performance of his duty, falls on him; but the application of that rule only makes the plaintiff's right to recover clearer. What precautions should have been taken by plaintiff by building the fence or otherwise was a question of fact for the jury and could not be thus summarily disposed of by the court in the absence of any such issue in the pleadings or proofs before the court.

Savage *vs.* R'y Co., *supra*.
Raridon *vs.* R'y Co., 22 N. W. Rep., 909.
Varner *vs.* R'y Co., 8 N. W. Rep., 634.
Lake *vs.* Milliken, 62 Me., 240.
2 Thompson Negligence, p. 1084.

Such a defence, if relied on, must be pleaded.
Pomeroy's Remedies, sec. 694.

20 At all events the plaintiff can recover the reasonable cost of the measures which he took to protect himself from the consequences of defendant's negligence, and this in turn enters into the question of the extent to which the value of the use of the farm has been depreciated.

1 Sutherland on Damages, 148.

But it is confidently submitted that under the rule that "where the party whose duty it is primarily to do the work necessary to stay injury resulting from his negligence or other wrong is in possession or has equal knowledge and opportunity he alone may be looked to fulfill that duty, and it will not avail him to say the injured party might have lessened the damages by performing the duty for him."

1 Sutherland on Damages, 150, 151.

It is no answer to plaintiff's claim for compensation to say that he might have intruded upon defendant's premises and performed the duty the performance of which the law so wisely and justly imposed upon it. Such intrusion would have been unlawful.

Karst *vs.* St. Paul, etc., R'y Co., 23 Minn., 401.

Downing *vs.* R'y Co., 43 Iowa, 96.

The compensation paid the owner of the land for right of way, whether the same be acquired by purchase or condemna-
21 tion proceedings, does not, unless otherwise agreed, cover the damages arising from the improper construction of the road or the operation of the same in an unlawful manner.

Mills on Eminent Domain, sec. 220 and cases cited.

Winona, etc., R'y Co. *vs.* Waldron, 11 Minn., 515.

Hence "separate actions must be instituted for the failure of the railway company to construct cattle-guards, as required by law, damage having accrued to the owner thereby."

Mills on Eminent Domain, *id.*

This brings us to the question of the measure of plaintiff's damages.

II.

The measure of damages for the neglect to fence is the same as is applicable generally in cases of torts—that is, actual compensation except in cases where exemplary damages are proper.

Field on Damages, sec. 850.

What was said by this court in Brakken *vs.* R'y Co., 29 Minn., 41–45, as to the measure of plaintiff's damages in a case where the railway company left a highway crossing in an improper condition applies with equal force to this case, viz: "We conceive the
22 true measure of plaintiff's damages to be compensation for the injury sustained by him from the improper condition in which the (railway) was left by the defendant; or, in other words,

the difference between the fair rental value of the property with the railroad in its present improper condition and its rental value with the road in a proper condition, the damages to be limited to the time of the commencement of the suit."

In Hull *vs.* Chicago, etc., R'y Co., 23 N. W. Rep., a case where, in consideration of the conveyance of the right of way, a railway company agreed to fence and put in crossings, it was held, on the authority of Varney *vs.* R'y Co., *supra*, that the true measure of plaintiff's damages for the failure to fence was the difference in the rental value of the premises. See also—

Smith *vs.* Chicago, etc., R'y Co., 38 Ia., 518.
Winne *vs.* Kelley, 34 Ia., 339.
Donald *vs.* St. Louis R'y Co., 44 Ia., 157.
St. Louis, etc., R'y Co. *vs.* Sharp, 13 Am. and Eng. R'y Cases, 595.
St. Louis, etc., R'y Co. *vs.* Ritz, 19 *id.*, 611.
C., R. I. & P. R'y Co. *vs.* Clare, *id.*, 621, and cases cited in note, p. 622.
3 Sutherland on Damages, 369.

If in the case of an agreement to fence the adjoining owner is entitled to compensation for the loss arising from the failure of the company to perform the duty thus imposed, such owner is
23 certainly entitled to no less where, as in this case, this obligation so persistently ignored is imposed by the plain provisions of the statute.

LOVELY, MORGAN & MORGAN,
Attorneys for Apellant.

24 STATE OF MINNESOTA:

Supreme Court, April Term, 1886.

HENRY G. EMMONS, Appellant,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, Respondent.

Respondent's Points and Authorities.

Lovely, Morgan & Morgan, attorneys for appellant; J. D. Springer, attorney for respondent.

25 Supreme Court, State of Minnesota, April Term, 1886.

HENRY G. EMMONS, Appellant,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, Respondent.

Respondent's Points and Authorities.

I.

Appellant claims that respondent is liable to him for depreciated rental value of his land occasioned by its failure to fence its railway.

At common law no such liability existed.

Wood *vs.* Paducah & M. R. R. Co., 4 Fed. Rep., 862, and cases cited.

In Fitzgerald *vs.* The St. P., M. & M. R'y Co., 29 Minn., 336, this court defined the purposes of these statutes as follows:

"Considering the terms of these statutes and the character
26 of fence which may be erected in compliance with the statutory requirement, it is the opinion of a majority of the court that the intention of the legislature was, by imposing the duty named in the statutes, to prevent domestic animals coming upon railroad tracks, with the consequent danger to the animals themselves and to passengers and employés upon railroad trains." This would seem to be decisive of appellant's claim, but his counsel affect not so to consider it and assert that sec. 4, chap. 24, as amended by chap. 73, *supra*, imposes a liability for all damages that may be caused by a failure to fence, and that depreciation in rental value of land arising from a failure to fence is one of the liabilities imposed.

The statutes in question were enacted under the police power of the State for the protection of the public (p. 712, Cooley's Constitutional Limitations, 5 ed.

Mo. P. R'y. Co. *vs.* Sirmes, 6 Sup. Court Rep., 113.)

and not for the protection of the adjoining land-owner, except so far as sec. 2 prescribes a liability for stock killed or injured by reason of a failure to fence.

As the statute creates a liability not before existing, it is to receive a strict construction and is not to be extended to those remote and indirect injuries which are not generally the subject of legal recovery.

There is no ground for distinction or difference between one whose land adjoins the railway and another whose land does not so adjoin. Each suffers the same kind of injury and damage, though the remote owner suffers in a lesser degree than the nearer or
27 adjoining owner, and if the adjoiner has a right of action so does every other owner who suffers the same kind of injury, though not to the same extent. A right of action would thus be given to those who suffer no special or different kind of injury from the general public in contravention to the general principles of law; such a construction resulting in such consequences ought not to be given unless the legislative intent is beyond doubt.

The statute in question simply imposes the duty to fence, makes it an act of negligence to omit the duty, and provides that the railway company that omits such duty is liable for all damages resulting therefrom. The statute does not do more than make that a duty which was not so at common law, and imposes the same liability for the omission of duty which the common law imposes for the omission of a common-law duty. This is practically the interpretation which this court has put upon these statutes in those cases in which

it is held that contributory negligence on the part of the owner of the stock killed or injured is a good defense.

Viewed in this light, no person can have a right of recovery for an omission of this duty unless he suffers some special injury different in character from the general public. A passenger who is injured by reason of a failure to fence could undoubtedly recover; so could an employé*r* unless he had waived the performance of this duty; so could an owner of stock unless his negligence contributed to the injury, and this because they suffer a special injury.

28 The duty to fence was not imposed upon railroad companies for the purpose of imparting greater value to the land of adjoining owners. If it was and the statute imposing it was valid, then undoubtedly the land-owner could sue for a breach of that duty; but the duty is not one incident to the land adjoining the railway and due to the owner thereof, for the duty is to fence the railway and not the right of way. The fence required is not in the nature of a partition fence. The railway company may build the fence so as to leave a part of the right of way ouside and the adjoining owner would have no right to trespass upon the right of way and connect his fences with the railway fences.

It is, therefore, plain that the duty imposed is a public duty, imposed for the benefit of the public, and a breach of it is a breach of public duty of which no one can complain except he sustains a special injury therefrom. If it were otherwise, and sec. 4 is to be construed as including all damages, public or private, direct or indirect, sec. 2, prescribing a liability for injuries to stock, would be entirely useless and meaningless.

II.

Respondent was a corporation existing under chap. 66, Special Laws, 1853; chap. 55, Special Laws, 1855; chap. 117, Special Laws, 1859; chap. 57, Special Laws, 1870; chap. 71, Special Laws, 1871, and chap. 96, Special Laws, 1872, at the time of the enactment of chaps. 24 and 73, *supra*, and it was not competent for the legis-

29 lature to impose the obligations and liabilities upon respondent which are claimed by appellant unless they come within the police power of the State.

If these statutes effect the result which is claimed for them by appellant they are not within the police powers of the State and impair rights granted by the State and are in violation of both the State and Federal constitution.

Sedgwick on Const. Law, pp. 434 to 439 and notes.

Cooley's Constitutional Lim., pp. 710 to 718 and notes to same.

It is submitted that the order appealed from should be affirmed.

J. D. SPRINGER,
Att'y for Respondent.

30 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1886.

HENRY G. EMMONS, Appellant,
vs.
MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, Respondent.
} No. 89. Opinion.

According to the facts alleged in the complaint, its theory is that a railroad company which neglects to fence its road is, under the statute, liable for damages caused by such neglect to an abutting farm in rendering its use less valuable by exposing stock pastured or kept upon it to the dangers of an exposed and open railroad. The defendant insists that the damages recoverable under the statute are only the more direct and immediate damages caused by the killing or injuring of cattle getting access to the track for want of a fence or the injuring of passengers or employés on trains which come in collision with such cattle. The statute (Gen. St., 1878, c. 34, p. 57) is as follows: "Any company or corporation operating a line of railroad in this State, and which company or corporation has failed or neglected to fence said road and to erect crossings and cattle-guards, shall hereafter be liable for all damages sustained by any person in consequence of such failure or neglect." The language is certainly broad and general enough to cover damages to an abutting farm by exposing animals pastured or kept on it to the danger of an open railroad, thus rendering it less valuable for the purpose of raising or pasturing animals than it would be if
31 the railroad were fenced, as required by the statute. Such a case is within the letter of the statute, and we do not see why it is not within its spirit and purpose. That the section was intended to cover more than cases of damage by actually killing or injuring animals is manifest from the fact that the liability for such cases is provided for in section 55, and it is not to be presumed that section 57 was intended to be a mere repetition of that section.

Compliance by a railroad company with the requirement of the statute furnishes a measure of security to cattle on abutting lands against the acts and dangerous business of the company, and which security the statute must have intended the company should provide to such lands. The object was not to benefit those lands—that is, to improve and render them more valuable—but to prevent, as far as possible, injury to them from maintaining and operating a railroad through or alongside of them. That a farm through which or along which a railroad runs is less valuable by reason of the road being without fences than it would be if the road were properly fenced must be apparent to any one.

In Winona & St. P. T. Co. *vs.* Waldron, 11 Minn., 392 (515), 408 (533), this court said: "We think it should admit of no doubt that, in the absence, at least, of different statutory legislation, where a railroad company passes through improved land the cost of constructing additional fencing rendered necessary by the road is a proper element of damage to the owner of the land taken *in invitum*

for the purpose of the road; but when the railroad company, whether as a condition or limitation of their right to take land for their road or as a police regulation, is required by statute to
32 construct such fences the damages for taking the land should be assessed upon the basis of the construction of such fences by the company, in accordance with the statutory requisition." This proceeds on the theory that the requirement to fence the road is, in part at least, intended to, and that if complied with it will, protect the lands from the injurious effects on them that an open, unfenced road would have.

To regulate the carrying on of any business liable to be injurious to the property of others, like that of operating a railroad, so that it shall do the least possible injury to such property, is as much within the police power of the State as regulating it with a view to protect life from its dangers. There can be no doubt that the State may, under that power, require railroads to be so constructed, maintained, and operated, and so protected or inclosed that they will injure as little as possible the farms or lands through or alongside of which they run.

The suggestion that operating a railroad without the fences required by the statute is in the nature of a common nuisance, and that none but those specially injured by it can maintain an action, has no application to the case. The general public do not have farms abutting on a particular railroad, and damage to such farms is not a damage common to all. It is peculiar to the owners of such farms. In the case of a public nuisance, if one sustains injury different in kind from that sustained by the public generally, it cannot be objected to his action that there are others, even many others, in the same situation as he.

As the court below dismissed the action, it, of course, did
33 not pass on the measure of plaintiff's damages, and that question is not before us. We determine only that, on the allegations of the complaint, the plaintiff may maintain the action.

Order reversed.

GILFILLAN, *C. J.*

34 State of Minnesota Supreme Court, General April Term, A. D. 1886.

—— MORNING, 9.30 o'CLOCK, *May 6th, A. D.* 1886.

Court convened pursuant to adjournment, all the justices being present.

HENRY G. EMMONS, Appellant,
vs.
THE MINNEAPOLIS AND ST. LOUIS RAILWAY COMPANY. } No. 89, 4475.

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was argued by counsel for the respective

parties, submitted to the court for decision, and taken under advisement.

A true record.

Attest: SAM. H. NICHOLS, *Clerk.*

The foregoing is a full and true copy of the minutes of argument in the above-entitled cause.

[SEAL.] Attest: SAM. H. NICHOLS, *Clerk.*

35 [Endorsed:] State of Minnesota supreme court. Copy of minutes of argument. Filed Oct 19, A. D. 1886. Sam. H. Nichols, clerk.

36 State of Minnesota Supreme Court, April Term, A. D. 1886.

HENRY G. EMMONS, Appellant,
vs.
THE MINNEAPOLIS AND ST. LOUIS RAILWAY COMPANY, Respondent, } No. 89.

Appeal from district court, tenth judicial district, county of Freeborn.

This cause having been duly argued and submitted at the general April term of this court, A. D. 1886, upon the return to the appeal herein—

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the order of the court below herein appealed from be, and the same hereby is, in all things reversed, and that the appellant above named have judgment accordingly.

Entered Sept. 29, A. D. 1886.

By the court:

Attest: SAM. H. NICHOLS, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original order for judgment entered in the above-entitled cause.

[SEAL.] Attest: SAM. H. NICHOLS, *Clerk.*

37 [Endorsed:] No. 4475. State of Minnesota supreme court. Copy of order for judgment. Filed Oct. 19, A. D. 1886. Sam. H. Nichols, clerk. Entered on page —.

38 State of Minnesota Supreme Court, April Term, A. D. 1886.

HENRY G. EMMONS, Appellant,
vs.
THE MINNEAPOLIS AND ST. LOUIS RAILWAY COMPANY, Respondent. } No. 89.

Pursuant to an order of court duly made and entered in this cause on the twenty-ninth day of September, A. D. 1886—

It is here and hereby determined and adjudged that the order of the court below herein appealed from, to wit, of the district

court of the tenth judicial district, sitting within and for the county of Freeborn, be, and the same hereby is, in all things reversed.

And it is further determined and adjudged that the appellant above named do have and recover of said The Minneapolis and St. Louis Railway Company herein the sum and amount of fifty-five dollars and fifty cents ($55.50), costs and disbursements in this cause in this court, and that said appellant have execution for the enforcement thereof.

Dated and signed this nineteenth day of October, 1886.

By the court:

Attest: SAM. H. NICHOLS, *Clerk.*

Statement for Judgment.

Costs allowed by statute	$25 00
Clerk's fees for making return	
Printer's fees for printing paper, book, and briefs, etc.	19 00
Clerk's fees supreme court	9 50
Execution and return	
Filing mandate and docketing transcript	1 00
Affidavits	1 00
Postage	
Copying return for printer	
	$55 50

39 [Endorsed:] 4475. State of Minnesota supreme court. Transcript of judgment. Filed Oct. 19, A. D. 1886. Sam. H. Nichols, clerk. —— ——, attorney for —. Page No. —, — book.

STATE OF MINNESOTA, *Supreme Court,* } ss:

I, Sam. H. Nichols, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the entry of judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom.

Witness my hand and the seal of said supreme court, at the capitol, in the city of St. Paul, this 19th day of October, A. D. 1886.

SAM. H. NICHOLS, *Clerk.*

40 STATE OF MINNESOTA:

Supreme Court, October Term, 1887.

HENRY G. EMMONS, Appellant,
against
THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, Respondent.

HENRY G. EMMONS, Respondent,
against
THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, Appellant.

Paper Book.

Lovely & Morgan, attorneys for plaintiff; B. S. Lewis, attorney for defendant.

41 STATE OF MINNESOTA, *County of Freeborn*, } *ss:*

District Court, Tenth Judicial District.

HENRY G. EMMONS, Plaintiff,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, Defendant. } Summons.

The State of Minnesota to the above-named defendant:

You are hereby summoned and required to answer the complaint in this action, a copy of which is herewith served on you, and to serve a copy of your answer to the said complaint on the subscribers at their office, in Albert Lea, Freeborn county, Minnesota, within twenty days after the service of this summons upon you, exclusive of the day of such service, and if you fail to answer the complaint within the time aforesaid the plaintiff in this action will have the amount he is entitled to recover ascertained by the court or under its direction and take judgment for the amount so ascertained and for costs.

Dated December 10, A. D. 1884.

LOVELY & MORGAN,
Plaintiff's Attorneys.

42 State of Minnesota Supreme Court, October Term, 1887.

HENRY G. EMMONS, Appellant,
against
THE MINNEAPOLIS & ST. LOUIS RALWAY COMPANY, Respondent. } On Plaintiff's Appeal.

HENRY G. EMMONS, Respondent,
against
THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, Appellant. } On Defendant's Appeal.

From Freeborn county.

(*Complaint.*)

Now comes the above-named plaintiff, by Lovely & Mor-
43 gan, his attorneys, and complains of the above-named defendant in civil action, and for cause thereof alleges:

(1.) That said defendant at all the times hereinafter stated was and still is a railroad corporation duly incorporated, created, and organized under and by virtue of the laws of this State, and as such corporation at all of said times was in the possession of and operating a railroad in this State under the corporate name of the Minneapolis & St. Louis Railway Company.

(2.) That heretofore, to wit, on the 16th day of October, 1879, and for a long time prior thereto the said plaintiff was the owner and seized in fee simple of the following-described land and real estate, situated in the county of Freeborn and State aforesaid, to wit: The southeast quarter of section thirty-two (32), township one hundred and one (101), range twenty-two (22) west.

(3.) That, except as hereafter stated, said land was then, and ever since has been, owned and occupied by said plaintiff as a farm and homestead by himself and family, and at all of said times has been kept and maintained by him under cultivation for farming purposes, and was properly enclosed by a lawful fence; and he further alleges that the said farm was useful for the purpose of raising stock, and that at, prior to, and ever since said time said plaintiff was and has been the owner of a large number of horses, cattle, and other live stock, which he raised and cared for upon his said farm.

(4.) That on said 16th day of October, 1879, the said plaintiff sold to said defendant for its right of way over and across said
44 land the following-described piece or parcel of land, to wit, a strip of land one hundred feet in width, the same being fifty feet in width on each side of the center line of the Minneapolis & St. Louis railway, where the same is now located, over and across the southeast quarter of the southeast quarter of section 32, in township 101, of range 22.

(5.) That on and ever since said last-named day said defendant has occupied said land so purchased of said plaintiff as and for its right of way, over which it laid its track and has daily thereafter

continued to run its engines, locomotives, and trains of cars over and across the same.

(6.) Plaintiff further alleges that at all the times hereinafter set forth at the places where said railroad enters and leaves his said farm a public highway for wagons and teams ran and now runs along and past the said farm and adjoining the same on the east and south sides thereof, which said highway was and ever since has been crossed by said railroad.

(7.) Said plaintiff further alleges that for six months previous to said 16th day of October, 1879, said railroad had been built over and across said premises, but that the said defendant did not then nor has it since built or maintained any lawful fence or any fence whatever on each or either side of its said railroad and between the land so occupied by it for right of way and the premises of said plaintiff, and has not built or maintained any cattle-guards where said railroad enters and leaves said land at the said public highway and wagon crossings, but that the said highway and wagon crossings and said farm have been left open during all of said times,
45 and said defendant in said respects has run and operated its said road contrary to the laws of this State over and across said land by neglecting to fence the sides of said railroad and to build said cattle-guards at said crossings, to the imminent peril and danger of said plaintiff's stock and cattle, to his great injury and annoyance during all of said time, whereby said plaintiff has been compelled to spend a great deal of time and money in watching his cattle and stock to prevent them from being killed and injured by the trains and engines of said defendant, and has been deprived of the free and beneficial use, occupation, and enjoyment of his said farm by reason of said defendant's unlawful use of that part of its railroad which crosses the same as aforesaid, which said unlawful use by said defendant has greatly diminished the value of its use and occupation by plaintiff and has totally destroyed its value for the purpose of raising stock thereon and has greatly hindered and delayed plaintiff in carrying on his said farm, whereby he has sustained damages in the sum of $1,000.00.

(8.) That by reason of the said several acts and omissions of said defendant this plaintiff has suffered and sustained damages in the sum of $1,000.00, for which sum he demands judgment against said defendant with all legal taxable costs.

Dated December 9th, 1884.

(Signed by counsel.)

(Verified.)

Answer.

Title as in complaint.

Answering the complaint of the plaintiff in the cause above
46 entitled, the defendant admits that at the times stated in said complaint it was and still is a railway corporation duly incorporated under and by virtue of the laws of this State, and that

at such times it was in the possession of and operating a railway in this State under the name of the Minneapolis & St. Louis Railway Company.

Whether the plaintiff on or since the 17th day of November, A. D. 1880, was the owner or seized in fee simple or otherwise of the lands described in said complaint or any thereof the defendant has neither knowledge nor information sufficient to form a belief. Whether said land has been owned or occupied by the plaintiff as a farm or homestead by himself or family or otherwise at any or all the times stated in said complaint or kept or maintained by the plaintiff under cultivation for farming purposes or was lawfully enclosed by a lawful fence or whether the same was useful for the purpose of raising stock or that at any time the plaintiff has been the owner of a large or any number of horses, cattle, or other live stock which he raised or cared for on said premises defendant has neither knowledge nor information sufficient to form a belief.

Defendant admits that on or about the 17th day of November, A. D. 1880, it purchased the right of way in said complaint described from plaintiff, and ever since that time it has continued to run its engines, locomotives, and trains of cars over and across the same; and the defendant denies each and every allegation in said
47 complaint contained not hereinbefore admitted or denied upon information and belief.

(Signed by counsel.)

(Verified.)

Settled Bill of Exceptions.

This action came on for trial at a general term of the district court in and for the county of Freeborn, State of Minnesota, on the 19th day of May, 1887, before the Honorable John Q. Farmer, judge of said district court, and a jury.

Messrs. Lovely, Morgan & Morgan appeared for the plaintiff and B. S. Lewis, Esq., appeared for the defendant.

A jury was empanneled and sworn in said cause, after which the plaintiff was duly sworn in his own behalf as a witness.

Before any testimony was given the defendant objected to the reception of any evidence in said cause on the ground that the complaint did not state a cause of action; which objection was overruled, and the defendant then and there duly excepted to such ruling.

Evidence was then given on the part of the plaintiff to support the allegations of the complaint that the farm in question had been during all the times mentioned in the complaint enclosed by lawful fences except across and along the railroad right of way; and evidence was also given to support all the other allegations of the complaint except those relating to the amount and measure
48 of damages; and upon these questions the evidence and proceedings were as hereinafter stated.

It is agreed that the cost of building and maintaining a lawful

fence on the line between both sides of the railroad right of way and the plaintiff's land for the time stated in the complaint would have been one hundred and twenty-five dollars.

The plaintiff having shown competency of the witness to answer as to rental values then asked the witness the following question:

Question. What was the difference between the rental value of the premises described in the complaint with the railroad fences lawfully constructed thereon and the rental value of said premises without such fences during the time alleged in the complaint?

To which question the defendant then and there objected upon the ground that the same was irrelevant and incompetent and did not tend to prove the proper measure of damages.

After argument by counsel the court ruled that the measure of damages was the difference between the rental value of the farm with the railroad lawfully fenced and the rental value with the railroad unfenced, but that the damages could not in any event exceed the cost of building and maintaining a lawful fence along the line of the railroad upon the land in question.

The plaintiff then and there duly excepted to that part of the ruling which limited the damages to the cost of fencing, and the defendant then duly excepted to that part of the ruling which
49 fixed the difference in rental value as the measure of damages.

The plaintiff then proved the difference in rental value of the premises during the time in question to the amount of one hundred and twenty-five dollars.

To which proof the defendant duly objected on the ground that the same was incompetent and irrelevant and did not tend to prove the proper measure of damages; which objection was overruled by the court, and the defendant duly excepted.

The plaintiff then offered to prove that the difference in the rental value of the premises described in the complaint with proper fences built thereon by the railroad company as required by law and the rental value of the same without such fences was one hundred dollars a year during the time alleged in the complaint.

To which offer the defendant then and there objected on the ground that such evidence was incompetent and immaterial and did not tend to prove the proper measure of plaintiff's damage. The court sustained said objection, and the plaintiff then and there duly excepted to such ruling.

The plaintiff then offered to prove the actual damage sustained by him in protecting his crops and preventing his stock from getting upon the railroad track by reason of defendant's negligence in failing to fence its tracks to the amount of fifty dollars a year in excess of the cost of building and maintaining lawful fences during the time alleged in the complaint.

Which said offer was then and there excepted to by the
50 defendant as irrelevant and incompetent and not tending to prove the proper measure of plaintiff's damages; which objection was sustained by the court, and the plaintiff then and there duly excepted.

It was admitted by the defendant that no fences had been built or maintained by the railroad company during the time mentioned in the complaint on the premises described in the complaint, and that the railroad has been maintained and operated as alleged in the complaint.

No proof was offered by the plaintiff that he had built or maintained a fence to supply the place of fences which the railroad company had neglected to build.

The plaintiff then rested and the defendant offered no evidence.

The court then instructed the jury that the measure of the plaintiff's damages was the difference in rental value of the premises with the railroad fenced and the rental value of the premises with the railroad unfenced, not exceeding the cost of building and maintaining such fences during the time alleged in the complaint.

The plaintiff then and there duly excepted to that portion of the charge which limited the damages to the cost of fencing.

The defendant then and there duly excepted to that portion of the charge which stated that the difference in the rental value was the measure of damages.

51 The jury afterwards returned a verdict for the plaintiff for the sum of $125.00.

The above and foregoing bill of exceptions was presented to the court at a special term held in the court-house, in Albert Lea, in said county, on the 25th day of July, 1887, and, having been examined and found conformable to the truth, the same is hereby allowed and signed as such.

Dated July 25th, 1887.

JOHN Q. FARMER,
District Judge.

STATE OF MINNESOTA, }
County of Freeborn. }

District Court, Tenth Judicial District.

HENRY G. EMMONS, Plaintiff,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, Defendant.

And now comes the plaintiff at the special term of said court held at the court-house, in the city of Albert Lea, in said county, and moves the court, upon the pleadings and settled bill of exceptions, for a new trial thereof for the following reasons:

1. That the verdict is contrary to law.
2. That there was error in law occurring at the trial and excepted to by the plaintiff.

LOVELY, MORGAN & MORGAN,
Plaintiff's Attorneys.

STATE OF MINNESOTA, }
County of Freeborn. }

District Court, Tenth Judicial District.

HENRY G. EMMONS, Plaintiff,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, Defendant.

And now comes the defendant at the special term of said court held at the court-house, in the city of Albert Lea, in said county, and moves the court upon the pleadings and settled bill of exceptions for a new trial thereon for the following reasons:

1. That the verdict is contrary to law.
2. That there was error in law occurring at the trial and excepted to by the defendant.

B. S. LEWIS,
Defendant's Attorney.

Filed July 25th, 1887.
GEO. T. GARDNER,
Clerk of Dist. Court.

52 STATE OF MINNESOTA, }
County of Freeborn. }

District Court, Tenth Judicial District.

HENRY G. EMMONS, Plaintiff,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, Defendant.

The plaintiff & defendant in the above-entitled action, at a special term of said court held at the court-house, in said county, on the 25th day of July, 1887, having each severally and separately moved the court upon the pleadings and settled bill of exceptions for a new trial thereof upon the grounds stated in their several motions in writing and which are on file—

Messrs. Lovely, Morgan & Morgan appeared for the plaintiff, and B. S. Lewis, Esq., appeared for the defendant.

After hearing and duly considering the arguments of the respective counsel in support of said motions, it is ordered that said motions and each of them be, and they are hereby, severally denied.

Dated July 25, 1887.

JOHN Q. FARMER,
Dist. Judge.

Filed July 25th, 1887.
GEO. T. GARDNER,
Clerk of Dist. Court.

That this testimony was incompetent and erroneous can be seen by reference to the cross-examination of each witness, where it appears that no one of them could tell or had any opinion as to the rental value of the farm as a whole.

III.

The court allowed the following questions to be asked and answered:

"Q. How much stock did you have at that time?" Folio 17.

"Q. I would like to have you tell us what your usual method of taking care of this stock on your farm was." Folio 18.

"Will you go on and state to the jury just what you did, not what you had to do, and how much trouble you had on account of their failure to fence?" Folio 24.

182 "Q. What did you see him (plaintiff) do in taking care of his stock from the time the railroad was built up to this time in 1884?" Folio 56.

Eight other questions of like character were permitted to be asked and answered and which are found in folios 17, 19, 24, 27, 28, 45, and 68, all of which constitute the 4th assignment of error.

The rule of damages as established on the second appeal in this case is the diminution of the rental value of this farm because of the non-fencing. The determination of this question does not depend on how the plaintiff used his farm or what he did. The rental value of a farm does not depend on how any person may happen to use it.

The material facts to enlighten the jury are the character of the soil, its suitableness to raise this or that kind of grain, whether best for grain, hay, or pasturage, the number of acres that could be profitably devoted to each of such purposes, the size and character of the buildings, how it was surrounded and divided up by fences, whether it was necessary to herd cattle to produce the best results, and other facts of like character. With such facts as these before them the jury can apply and weigh at their true worth the various opinions of the witnesses as to the rental value with the railroad fenced and the rental value without such fences and themselves compute what they think is the difference.

The evidence asked for and given was not directed to what use could be made of the farm in the course of good husbandry by a prudent man, but to what Mr. Emmons did without reference

183 to or evidence of the fact whether his style of farming was best adapted to the character of the farm.

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Witnesses are to testify to facts (although the facts may only be an opinion or estimate) and the jury has to take the facts—*i. e.*, the varying opinions of the witnesses as to the rental value of the whole farm as it is and the value as it ought to be—and weigh and consider them and calculate for themselves the difference in the rental value.

180 This is not an overrefinement and a distinction without a difference. Take, for example, two witnesses: Each might give his opinion that the difference in the rental value was $200.00 per year. If this were all the evidence the jury could only bring in a verdict of $200.00 for each year.

If, however, the witnesses were asked to give their opinion as to the rental value with the railroad fenced, and then as to the value with the railroad unfenced, the one witness might answer that the rental value of the whole farm with the railroad fenced was $1,000 per year and unfenced $800. The other witness that the rental value with the railroad fenced was $300.00 per year and unfenced only $100.00. The total difference in the estimates of the two witnesses would be the same in each case, but the percentage of difference of the two witnesses would be as 3 to 10.

If in such case the jury had the facts before them they might find the real difference in rental value to be a percentage between 3 and 10. At any rate, the jury could consider the evidence relating to the size, character, and soil of the farm and the uses it was best adapted to, and with it weight the evidence relating to the rental values in either case, and thus find the true difference without calling upon the witnesses to perform the functions of the jury.

This distinction has been directly passed upon and upheld by at least two courts of last resort.

City of Omaha *vs.* Kramer, 41 N. W. R., 295.
Moorhouse *vs.* Mathews, 2 N. Y., 514.
Van Dusen *vs.* Young, 29 N. Y., 9, 36.

181 The distinction is upheld by implication, at least, by this court.

Simmons *vs.* R'y, 18 Minn., 184.

This court has said that witnesses must testify as to the facts which go to make up the damages, including, of course, values, and that it was improper for the witnesses to give in gross the amount of the damage.

Todd *vs.* M. & St. L. R'y, 39 N. W. R., 318.

cent to the obstruction simply because of the ownership, nor can a land owner whose lands adjoin an unfenced railroad recover simply because of his ownership. In neither case does the simple fact of the ownership adjacent to the obstruction or to the unfenced railroad give a private right of action. In the case of an obstruction to a public highway the owner must show some special injury, so in the case of an unfenced railroad some special injury must be shown, but the special injury in such case cannot be shown, because the land-owner has no right to have his partition fences built by another.

(C.) To put a judicial construction on the railroad-fence law which would require the defendant, as a penalty or as a legal duty, to pay damages for non-fencing to a particular class of persons—*i. e.*, owners of adjoining lands—and not to others suffering injury of the same character would be a violation of both the spirit and the words of the fourteenth amendment to the Federal Constitution, and
178 also to the State constitution, which guarantees to every one equal rights and privileges.

Cooley Con. Lim., 392.
Durkee *vs.* Janesville, 28 Wis., 464.
In re Parrot, 1 Fed. R., 481.
Holden *vs.* James, 11 Mass., 236.
Nichols *vs.* Walter, 33 N. W. R., 800.

Nor can all land-owners recover damages, because, as we have shown, those damages have been simply sustained by them as members of the body politic.

(D.) The railroad-fence law is penal in its character because it is aimed against a certain class of corporations and is derogatory to the rights of the corporation.

Sprague *vs.* Birdsell, 2 Cowen, 419.

Because it is derogatory of the common law and of the property rights of the corporation.

Melody *vs.* Read, 6 Mass., 471.
Gibson *vs.* Jenny, 15 Mass., 204.
Sharp *vs.* Spier, 4 Hill, 76.

Penal laws must be strictly construed, and the general words "all damages," in section 57, must be restricted to the application necessary to accomplish the purposes of the statute.

179 II.

This court in this appeal, as in the last, may not consider the argument under the first subdivision thereof on the ground that the question was settled by the first appeal in this case.

In such event we insist that the questions stated in the second assignment of errors are each incompetent, even if this plaintiff is entitled to recover for the diminution of the rental value of his farm caused by the railroad being unfenced.

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(C.) To put a judicial construction on the railroad-fence law which would require the defendant, as a penalty or as a legal duty, to pay damages for non-fencing to a particular class of persons—*i. e.*, owners of adjoining lands—and not to others suffering injury of the same character would be a violation of both the spirit and the words of the fourteenth amendment to the Federal Constitution, and
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In such event we insist that the questions stated in the second assignment of errors are each incompetent, even if this plaintiff is entitled to recover for the diminution of the rental value of his farm caused by the railroad being unfenced.

Each of these questions call- for the opinion of the witness as to

That this testimony was incompetent and erroneous can be seen by reference to the cross-examination of each witness, where it appears that no one of them could tell or had any opinion as to the rental value of the farm as a whole.

III.

The court allowed the following questions to be asked and answered:

"Q. How much stock did you have at that time?" Folio 17.

"Q. I would like to have you tell us what your usual method of taking care of this stock on your farm was." Folio 18.

"Will you go on and state to the jury just what you did, not what you had to do, and how much trouble you had on account of their failure to fence?" Folio 24.

182 "Q. What did you see him (plaintiff) do in taking care of his stock from the time the railroad was built up to this time in 1884?" Folio 56.

Eight other questions of like character were permitted to be asked and answered and which are found in folios 17, 19, 24, 27, 28, 45, and 68, all of which constitute the 4th assignment of error.

The rule of damages as established on the second appeal in this case is the diminution of the rental value of this farm because of the non-fencing. The determination of this question does not depend on how the plaintiff used his farm or what he did. The rental value of a farm does not depend on how any person may happen to use it.

The material facts to enlighten the jury are the character of the soil, its suitableness to raise this or that kind of grain, whether best for grain, hay, or pasturage, the number of acres that could be profitably devoted to each of such purposes, the size and character of the buildings, how it was surrounded and divided up by fences, whether it was necessary to herd cattle to produce the best results, and other facts of like character. With such facts as these before them the jury can apply and weigh at their true worth the various opinions of the witnesses as to the rental value with the railroad fenced and the rental value without such fences and themselves compute what they think is the difference.

The evidence asked for and given was not directed to what use could be made of the farm in the course of good husbandry by a prudent man, but to what Mr. Emmons did without reference
183 to or evidence of the fact whether his style of farming was best adapted to the character of the farm.

Mr. Emmons had a pasture where he kept his stock in the summer, and it was not necessary to herd and watch them either before or after the railroad was built. He only turned them out and had to watch them after the crops were removed, and then mainly that they might eat up the corn-stalks left in the field. Perhaps a more prudent and better farmer would have gathered his corn-stalks for fodder and fed his cattle in the yard. In such case the cost of herding would have been very small and the diminution in the rental value so much less.

If the way the plaintiff conducted his farming operations is material and competent, it is because the damage in each case like this would depend on the cost and expense and annoyance each landowner had paid and suffered because of the non-fencing. This in turn would depend on whether he was a careful and prudent man and a good farmer, etc.

But this individual cost, expense, and annoyance is not the measure of the diminution in rental value in each particular case. If so, the diminution in rental value of a particular farm would be a certain amount if "A" was the owner and another amount greater or less if "B" was the owner.

The questions embraced in the 4th assignment of errors have no tendency to prove the diminution in the rental value, and the jury must have been mislead and supposed that they should take the evidence into account.

184 IV.

The court followed up the above line of inquiry by instructing the jury that—

"One way is to show what the property is used for, what it is used for in fact, and what use it can be put to, and taking all those facts together we arrive at the proximate rental value of the land." (Fifth assignment of errors.)

If the questions in the fourth assignment of error were improper, then the instruction was erroneous.

The instruction is also open to the objection that there was not a word of evidence given in the case showing what use the farm might be put to other than how the plaintiff himself used it. The instruction in this respect was not based on any evidence and was therefore erroneous.

V.

The plaintiff, being asked how the neglect of the defendant to build its fence interfered with his use of the farm (folio 5, fourth assignment of error), answered that unless he watched them they would get on the road and then they would get into his neighbors' fields and he would be liable for damages, folio 20. The plaintiff gave substantially the same answers to other questions. Folios 21, 28.

185 Objection had been taken to the questions that they were incompetent, irrelevant, and immaterial. On cross-examination and not in response to a question plaintiff answered that he had to watch his cattle or else they would get on other people's land. The defendant moved to strike this out. The court refused so to do. (Sixth assignment of error.)

Admitting that it was discretionary with the court to grant this motion or not, the court permitted the jury to consider that class of evidence and refused to instruct them "that the plaintiff is not entitled to recover for any damages he might have suffered by reason of the defendant's acts complained of herein having rendered it

possible, if such is the case, for plaintiff's stock to escape from his land." (Sixth assignment of errors.) If the plaintiff was not entitled to recover additional damages because there was danger that his cattle might get into his neighbors' fields, the refusal to so instruct left the jury to believe that they should take these dangers into consideration.

If it were proper to take the danger into consideration in arriving at a verdict, then it would be proper to consider the fact of their having escaped into his neighbors' fields, and the sums the plaintiff had had to pay for damages and evidence of such facts would be proper.

These items of damage cannot be recovered, and also the diminution in rental value. The instruction should have been given.

186 VI.

The court erred in refusing a new trial on the ground that the verdict was not justified by the evidence. (Seventh assignment of errors.) There was no competent evidence from which the jury could determine the difference in rental value. We have discussed the character of the evidence given on direct examination under the second head hereof.

The cross-examination of the plaintiff shows that the only basis for his opinion was the trouble and expense he had in watching his stock. We have shown that this had no relation to the rental value. If, then, the opinion was formed on an erroneous basis the opinion itself is of no value and does not tend to support the verdict.

Neither the plaintiff- or any of his witnesses had or could give any estimate or opinion of the rental value of the whole farm with the railroad either fenced or unfenced. (See statement of facts.) If a witness has no opinion as to the rental value of the farm fenced nor as to its rental value unfenced he cannot make a substraction of values and form an opinion as to the difference in values which is of any worth to any one.

The cross-examination shows that the opinion given on direct examination was a mere guess and not founded on any facts. The whole of the direct evidence on the subject of damages falls
187 to the ground, if it were not already there, when tested by the cross-examination.

A new trial should be ordered by this court.

B. S. LEWIS,
Attorney for Appellant.

188 STATE OF MINNESOTA:

Supreme Court, April Term, 1889.

HENRY G. EMMONS, Respondent,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, Appellant.

Respondent's Brief.

Lovely, Morgan & Morgan and Walter J. Trask, attorneys for respondent.

189 STATE OF MINNESOTA:

Supreme Court, April Term, 1889.

HENRY G. EMMONS, Respondent,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, Appellant.

I.

The very able discussion of the first, second, and third assignments excites our admiration for the learning and pertinacity of appellant's counsel, but time will not permit us to enter upon
190 unnecessary labor, and since these points are no longer *res integra*, having been twice determined in this very case, we shall "pass on" with confident reliance on the previous action of this court.

Emmons *vs.* Appellant, 35 Minn., 503 (first appeal).
Emmons *vs.* Appellant, 36 N. W. Rep., 340 (second appeal).

II.

It is now conceded that if we can recover at all that the diminution in a rental value of the plaintiff's farm caused by running an unfenced railroad through it is the proper subject of inquiry and furnishes the true measure of damages. Such a question has always been considered in this State upon the same and cognate issues as appropriate subject-matter for expert testimony or as authorizing the opinions of experienced persons upon values and the inferences to be drawn in the particular case either of knowledge of the facts or of special knowledge applicable to such cases in general.

Harrington *vs.* St. P. & S. C. R'y Co., 17 Minn., 215.
Simons *vs.* St. P. & C. R'y Co., 18 Minn., 184.
Grannes *vs.* St. P. & C. R'y Co., 18 Minn., 194.
Lehmicke *vs.* St. P., S. & T. F. R'y Co., 19 Minn., 464.
191 Stinson *vs.* C., St. P. & M. R'y Co., 27 Minn, 284.
Byrne *vs.* M. & St. L. R'y Co., 29 Minn., 200.
Leber *vs.* M. & N. R'y Co., 29 Minn., 256.
Sherman *vs.* St. P., M. & M. R'y Co., 30 Minn., 227.

In the above cases opinions were allowed to show the diminution in value of property affected by lands taken *in invitum* for railroad purposes. The rule is the same when property is injuriously affected by some wrongful act or nuisance.

Barnett *vs.* St. A. Falls W. P. Co., 33 Minn., 265.

Appellant does not deny that the witnesses were competent, or that their opinions upon the question of diminution were material, but claims that they should have stated the rental value (in their opinion) of the farm without the nuisance and the rental value with the nuisance, leaving the jury to make the subtractions instead of permitting the witnesses to make them, although the mathematical result would have been the same or must have been the same either way if right; in other words, that a primary axiom of Euclid should be amended so as to declare that things which are equal to the same thing are not equal to each other. If the proposition does not answer itself, we confess that it is unanswerable in reason and logic, although there is abundant authority both in our own and
192 other courts for the course adopted; some cases go further even and permit in such issues questions as to the amount of damage sustained to be directly answered.

Mills Eminent Domain, 165.
Lehmicke *vs.* St. P., S. & T. F. R'y Co., 19 Minn., 464.
Leber *vs.* M. & N. R'y Co., 29 Minn., 256.
Sherman *vs.* St. P., M. & M. R'y Co., 30 Minn., 227.
Barnett *vs.* St. A. Falls W. P. Co., 33 Minn., 265.
Shattuck *vs.* Stoneham, &c., 6 Allen, 115.
Clark *vs.* Baird, 5 Selden (N. Y.), 183.

III.

The thorough examination of plaintiff regarding the manner of carrying on his farm, what it was useful for, and what he did to ameliorate his condition and the damages suffered was obviously proper. The plaintiff was a farmer—presumably a good one—and his own actual use of the property injured is clearly competent as tending to show the capabilities of the farm, the facts constituting the diminished rental value thereof, and the actual injury to his use for which he asks damages. The plaintiff nowhere claims a peculiar value to himself by reason of a peculiar use; his use and occupation of the premises was the ordinary, common, practical way of general farming, about which there is no great mystery, and it was proper in all its details to show actual damage, the
193 means of information and the basis of judgment which he exercised in making up his estimate of damage, and also the condition of the whole farm in use and operation, which was essential to show the effect, both actual and probable, of defendant's wrongful acts.

IV.

The exception to the charge of the court shows the extremity of hypercritical despair. The language excepted to was used by the

court by way of illustration merely, directs nothing, contains several statements which, upon the facts in proof and taken in connection with the whole charge, was generally and in each particular correct. The use of property has at least some tendency to show its value, and if it has other uses than that which it has been put to such uses might operate upon the human mind in considering its actual worth unless it was a purely ornamental affair, like a tin whistle, a brass breastpin, or, say, a Minnesota fencing statute to a contumacious railroad company.

V.

There was no claim at the trial that plaintiff's cattle did damage upon other lands than his own, nor was it claimed either that other cattle got upon his lands. The evidence was directed to the
194 necessity of having the railroad fenced to avoid the labor and burden of keeping up a constant watch to prevent the escape of cattle upon the defendant's right of way. Their escape was the material injury which subjected them principally to the danger of being killed or straying from home, which latter contingency was a minor consideration of far less consequence. But be this as it may, the instruction asked would, if given, have told the jury in effect that plaintiff could not recover at all for if he could not recover if cattle escaped from his land (upon the railroad track, for instance) (see instruction, folio 81) it is hard to see for what, in any event, he could recover or what state of facts would give him a cause of action. We hardly deem it necessary to refer to the previous decisions of this court in this case to show that plaintiff has a cause of action. We will take that for granted, and it follows that the instruction which declared in effect that he did not have a cause of action was properly refused.

VI.

It seems useless to consider the order of the court below in refusing a new trial. The plaintiff's farm, its uses, actual and contingent, were before the jury. The manner in which its use was affected by the imposition of defendant's nuisance *were* also clearly presented by proof and illustrated by an excellent diagram. As we have seen, there are no legal errors in the record, and no
195 claim is made in counsel's brief that the damages were too large. Whether large or small matters little, however, since the insolvent defendant (now in the hands of a receiver) is as little inclined to pay them as it has been in the past to observe the plain and imperative obligations of the wholesome statute it has violated in trampling upon the rights of the plaintiff. We hope at least to have the sanction of this court for the justice of our recovery, though the barren victory brings no hopes of better compensation.

LOVELY MORGAN & MORGAN AND
WALTER J. TRASK,
Respondent's Attorneys.

196 STATE OF MINNESOTA:

April Term, A. D. 1889.

HENRY G. EMMONS, Respondent,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, Appellant. } Opinion.

This case has already been twice before this court (35 Minn., 503; 29 N. W. Rep., 202, and 38 Minn., 215; 36 N. W. Rep., 340), and every question, except one, involved in the appeal was passed upon in the similar case of Nelson *v.* Railroad Co., *ante*, 788 (just decided).

Upon the trial expert witnesses were asked and permitted to answer the question what, in their opinion, was the difference between the rental value of the farm with the railroad fenced and the rental value with the railroad unfenced. Defendant assigns this as error, claiming that the proper mode of examination is to ask a witness, first, what would be the rental value with the road fenced and then what it is with it unfenced and leave it to the jury to say what the difference is. Some courts disapprove of the first method of examination, holding that the latter is the only proper one. Probably the latter is preferable, inasmuch as if the witness gives the rental values with and without the fence the jury can see in what ratio or percentage the rental value is, in his opinion, diminished by reason of the want of the fence. But we do not think it a matter of
197 great practical importance. If the opposite party desires to ascertain the basis of the witness' opinion he can ask these questions on cross-examination. Both modes of examination have been pursued indiscriminately in analogous cases in this State for many years, and the mode followed in the present case has been repeatedly recognized with implied approval by this court. See Simmons *v.* Railway Co., 18 Minn., 184 (Gil., 168); Lehmicke *v.* Railway Co., 19 Minn., 464 (Gil., 406); Leber *v.* Railway Co., 29 Minn., 256; 13 N. W. Rep., 31. We do not feel disposed to change the practice at this late day. The trial judge may, in his discretion, permit either form of examination.

Judgment affirmed.

MITCHELL, *J.*

198 State of Minnesota Supreme Court, General April Term, A D. 1889.

FRIDAY MORNING, 9.30 O'CLOCK, *May 31st, A. D.* 1889.

Court convened pursuant to adjournment, all the justices being present.

HENRY G. EMMONS, Respondent,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, Appellant. } No. 5699, 70.

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was argued by counsel, submitted to the court for decision, and taken under advisement.

A true record.

Attest: J. D. JONES, *Clerk.*

The foregoing is a full and true copy of the minutes of argument in the above-entitled cause.

Attest: J. D. JONES, *Clerk.*

199 [Endorsed:] State of Minnesota supreme court. Copy of minutes of argument. Filed —— —, A. D. 188–. ——, clerk.

200 State of Minnesota Supreme Court, April Term, A. D. 1889.

HENRY G. EMMONS, Respondent,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, Appellant. } No. 70.

Appeal from district court, tenth judicial district, county of Freeborn.

This cause having been duly argued and submitted at the general April term of this court, A. D. 1889, upon the return to the appeal herein—

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the judgment of the court below herein appealed from be, and the same hereby is, in all things affirmed, and that the respondents above named have judgment accordingly.

Entered July 19th, A. D. 1889.

By the court:

Attest: J. D. JONES, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original order for judgment entered in the above-entitled cause.

Attest: J. D. JONES, *Clerk.*

201 [Endorsed:] No. —. State of Minnesota supreme court. Copy of order for judgment. Filed —— —, A. D. 188–. —— ——, clerk. Entered on page —.

202 State of Minnesota Supreme Court, April Term, A. D. 1889.

HENRY G. EMMONS, Respondent,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, Appellant. } No. 70.

Pursuant to an order of court duly made and entered in this cause on the 19th day of July, A. D. 1889—

It is here and hereby determined and adjudged that the judgment of the court below herein appealed from, to wit, of the district

court of the tenth judicial district, sitting within and for the county of Freeborn, be, and the same hereby is, in all things affirmed.

And it is further determined and adjudged that the respondent above named do have and recover of said The Minneapolis & St. Louis Railway Company, appellant herein, the sum and amount of forty-four & $\frac{50}{100}$ dollars ($44.50), costs and disbursements in this cause in this court, and that said respondent have execution for the enforcement thereof.

Dated and signed this 19th day of July, 1889.

By the court:

Attest: J. D. JONES, *Clerk.*

Statement for Judgment.

Costs allowed by statute	$25 00
Clerk's fees for making return	
Printer's fees for printing brief	8 50
Clerk's fees supreme court	10 00
Execution and return	
Filing mandate and docketing transcript	
Affidavits and acknowledgments	1 00
Postage	
Copying return for printer	
	$44 50

203 [Endorsed:] State of Minnesota supreme court. Transcript of judgment. Filed —— —, A. D. 188–. —— ——, clerk. —— ——, attorney for —. Page No. —, — book.

STATE OF MINNESOTA, *Supreme Court,* } ss:

I, J. D. Jones, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the entry of judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom.

Witness my hand and the seal of said supreme court, at the capitol, in the city of St. Paul, this 19th day of July, A. D. 1889.

J. D. JONES, *Clerk.*

204 To the Honorable James Gilfillan, chief justice of the supreme court of Minnesota:

Now comes the Minneapolis and St. Louis Railway Company, by James D. Springer, its attorney, and complains that in the records and proceedings and also in the rendition of a judgment in a suit between Henry G. Emmons, plaintiff, and the said Minneapolis and St. Louis Railway Company, defendant, in the supreme court of Min-

nesota, being the highest court of law or equity of the State of Minnesota in which a decision could be had in said suit, and in which a final judgment was rendered against it on the 19th day of July, A. D. 1889, in said suit, wherein it was adjudged that so much of chapter 24, General Laws of Minnesota for 1876, and of chapter 73, General Laws of Minnesota for 1877, as was held to impose responsibility upon the said railway company for damages for the diminution in the rental value of the farm of said Henry G. Emmons, occasioned by the failure of plaintiff in error to fence its railway, did not impair the obligations of the charter of said railway company, contrary to the clause of section ten (10), article one (1), of the Constitution of the United States, which prohibits any State from passing any law impairing the obligation of contracts; also that it did not deprive said railway company of its property without due process of law, contrary to the 14th amendment to the Constitution of the United States nor deny to the said railway company the equal protection of the laws, contrary to the said 14th amendment. It was also adjudged by said supreme court, by its said final judgment in said suit, that so much of said chapter- 24 and 73 as was held to impose
205 upon the said railway company the duty of building or maintaining at its own sole cost and expense the fence of its railway was not in contravention of the said provisions of the Constitution of the United States, all of which appears in the records and proceedings of said suit, whereby manifest error has happened, to the great damage of the said railway company.

Wherefore the said railway company prays for the allowance of a writ of error and for such other process as may cause the same to be corrected by the Supreme Court of the United States.

J. D. SPRINGER,
Attorney for Minneapolis and St. Louis Railway Company, Minneapolis, Minn.

Allowed.

JAMES GILFILLAN,
Chief Justice Supreme Court Minnesota.

206 [Endorsed:] 5699. M. & St. L. R'y Co. *vs.* Emmons. Petition for writ of error. Filed Aug. 5, 1889. J. D. Jones, clerk.

207 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Minnesota, Greeting:

Because that in the records and proceedings and also in the rendition of the judgment of a plea which is in the supreme court of Minnesota, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Henry G. Emmons and The Minneapolis and St. Louis Railway Company, wherein was drawn in question the validity of a statute of the said State on the ground of its being repugnant to the Constitution of the United States and the decision was in favor

of such validity, a manifest error had happened, to the great damage of the Minneapolis and St. Louis Railway Company, as by its complaint appears—

We, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with the writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

208 Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States.

[Seal U. S. Circuit Court, Dist. of Minnesota.]

OSCAR B. HILLIS,
Clerk of the Circuit Court of the United States for the District of Minnesota.

209 [Endorsed:] 5699. M. & St. L. R'y Co. *vs.* Emmons. Writ of error. Filed Aug. 5, 1889. J. D. Jones, clerk.

210 UNITED STATES OF AMERICA, *ss:*

To Henry G. Emmons, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the 2d Monday in October next, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of Minnesota, wherein The Minneapolis and St. Louis R'y Co. is plaintiff in error and you are defendant in error, to show cause, if any there by, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable James B. Gilfillan, chief justice of the supreme court, district of Minnesota, this 5th day of August, A. D. 1889.

JAMES GILFILLAN,
Chief Justice.

211 [Endorsed:] 5699. M. & St. L. R'y Co. *vs.* Emmons. Citation. Due service of this citation and the writ of error mentioned therein admitted this 5th day of August, A. D. 1889, at St. Paul, Minn. John A. Lovely, att'y for defendant in error. Filed Aug. 5, 1889. J. D. Jones, clerk.

212 Supreme Court of the United States, October Term, 1889.

THE MINNEAPOLIS AND ST. LOUIS RAILWAY COMPANY, Plaintiff in Error.
vs.
HENRY G. EMMONS, Defendant in Errror.

Assignment of Errors.

(1.) The court erred in holding the plaintiff in error responsible in damages for the diminution in rental value of the abutting farm of defendant in error occasioned by the failure of plaintiff in error to fence its railway.

(2.) The court erred in holding that so much of chapter 24, General Laws of Minnesota for 1876, and chapter 73, General Laws of Minnesota for 1877, as is held to impose responsibility upon plaintiff in error for damages for the diminution in the rental value of the farm of defendant in error occasioned by the failure of plaintiff in error to build or maintain the fence in question did not impair the obligations of the charter of the plaintiff in error, contrary to the clause of section 10, article one (1), of the Constitution of the United States, which prohibits any State from passing any law impairing the obligation of contracts.

(3.) The court erred in holding that so much of chapter 24 of the General Laws of Minnesota for 1876 and chapter 73, General Laws of Minnesota for 1877, as is held to impose responsibility upon plaintiff in error for damages for the diminution in rental
213 value of the abutting farm of defendant in error occasioned by the failure of plaintiff in error to build and maintain the fence in question did not deprive the plaintiff in error of its property without due process of law, contrary to the 14th amendment to the Constitution of the United States.

(4.) The court erred in holding that so much of chapter 24, General Laws of Minnesota for 1876, and chapter 73, General Laws of Minnesota for 1877, as is held to impose responsibility upon plaintiff in error for damages for the diminution in the rental value of the abutting farm of defendant in error to build or maintain the fence in question did not deny to the plaintiff in error the equal protection of the laws, contrary to the 14th amendment to the Constitution of the United States.

(5.) The court erred in holding that so much of chapter 24, General Laws of Minnesota for 1876, and chapter 73, General Laws of Minnesota for 1877, as is held to impose upon plaintiff in error the duty of building or maintainmg at its own sole cost and expense the fence in question did not impair the obligations of its charter, contrary to that clause of section (10), article one (1), of the Constitution of the United States which forbids any State from passing any law impairing the obligation of contracts.

(6.) The court erred in holding that so much of chapter 24, General Laws of Minnesota for 1876, and chapter 73, General Laws of Minnesota for 1877, as is held to impose upon plaintiff in
214 error the duty of building or maintaining at its own sole cost

and expense the fence in question did not deprive plaintiff in error of its property without due process of law, contrary to the 14th amendment to the Constitution of the United States.

(7.) The court erred in holding that so much of chapter 24, General Laws of Minnesota for 1876, and chapter 73, General Laws of Minnesota for 1877, as is held to impose upon plaintiff in error the duty of building or maintaining at its own sole cost and expense the fence in question did not deny to the plaintiff in error the equal protection of the laws, contrary to the 14th amendment to the Constitution of the United States.

(8.) The court erred in overruling the objections of plaintiff in error and in denying the motion of plaintiff in error to exclude the answers to the following questions:

First. "I will ask you what the difference between the fair rental value of the premises described in the complaint with the railroad fences lawfully constructed thereon and the rental value of said premises without such fences during the time alleged in the complaint."

Second. "I will ask you what, in your opinion, would be the difference between the fair rental value of that farm with the railroad running across it, fenced with a substantial fence, as required by law."

Third. "You have heard all the testimony. I will ask you what, in your opinion as a farmer, the difference in the fair rental value of that farm would be with the railroad fenced and without being fenced, as it was, per year from the time the railroad was
215 built across it up to December 9th, 1884."

Fourth. I will ask you what in your opinion would be the difference in the rental value of that farm with the railroad crossing it as it does, fenced lawfully and without the fence, between the 15th day of October, 1879, and the 9th day of December, 1884."

(9.) The court erred in admitting over the objections of plaintiff in error and in denying the motion of plaintiff in error to exclude the following evidence:

"And I had to watch them or else they would get on the other people's land."

(10.) The court erred in refusing to instruct the jury as follows: "The jury are further instructed that the plaintiff is not entitled to recover for any damages he might have suffered by reason of the defendant's act complained of herein having rendered it possible, if such is the case, for plaintiff's stock to escape *upon* his land."

(11.) The court erred in instructing the jury as follows: "One way is to show what the property is used for, what it is used for in fact, and what use it may be put to, and taking all those facts together we arrived at the proximate rental value of the land."

(12.) The court erred in affirming the correctness of the decision of the trial court in overruling the objections of the plaintiff in error and in denying the motion of plaintiff in error to exclude the following evidence:

First. "I will ask you what — the difference between the fair

216 rental value of the premises described in the complaint with the railroad fences lawfully constructed thereon and the rental value of said premises without such fences during the time alleged in the complaint."

Second. "I will ask you what in your opinion would be the difference between the fair rental value of that farm with the railroad running across it, fenced with a substantial fence, as required by law."

Third. "You have heard all the testimony. I will ask you what, in your opinion as a farmer, the difference in the fair rental value of the farm would be with the railroad fenced and without being fenced as it was per year from the time the railroad was built across it up to December 9th, 1884."

Fourth. "I will ask you what in your opinion would be the difference in the rental value of that farm with the railroad crossing it as it does, fenced lawfully and without the fence, between the 15th day of October, 1879, and the 9th day of December, 1884."

(13.) The court erred in affirming the correctness of the determination of the trial court in overruling the objections of the plaintiff in error and denying its motion to exclude the following evidence: "I had to watch them or else they would get on the other people's land."

(14.) The court erred in affirming the correctness of the action of the trial court in instructing the jury as follows: "One way is to show what the property is used for, what it is used for in fact, and what use it may be put to, and taking all these facts together we arrive at the proximate rental value of the land."

217 (15.) The court erred in affirming the correctness of the determination of the trial court in refusing to instruct the jury as follows:

"The jury are further instructed that the plaintiff is not entitled to recover for any damages he might have suffered by reason of the defendant's act complained of herein having rendered it possible, if such is the case, for plaintiff's stock to escape from his land."

(16.) The court erred in affirming the correctness of the decision of the trial court in admitting evidence over the objections of the plaintiff in error tending to show the diminution in the rental value of the farm of defendant in error occasioned by the failure of plaintiff in error to fence its railway and in overruling the motion of plaintiff in error to exclude the same.

(17.) The court erred in affirming the judgment of the trial court.

218 [Endorsed:] 5699. M. & St. L. R'y Co., pl'ff in error, *vs.* Henry G. Emmons, def't in error. Filed Aug. 5, 1889. J. D. Jones, clerk. Due service of the within pleading by copy is hereby admitted at ——, Minnesota, this — day of ——, A. D. 188-. ——, attorney for —. James D. Springer, Minneapolis, Minn., attorney for defendant.

219 Supreme Court of the United States, *ss:*

HENRY G. EMMONS, Plaintiff,
vs.
THE MINNEAPOLIS AND ST. LOUIS RAILWAY COMPANY, Defendant.

Know all men by these presents that we, the Minneapolis and St. Louis Railway Company, as principal, William H. Truesdale and James D. Springer, as sureties, are held and firmly bound unto Henry G. Emmons, of Freeborn county, in the State of Minnesota, in the sum of two thousand ($2,000) dollars, to be paid to the said Henry G. Emmons, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 2nd day of August, A. D. 1889.

Whereas the above-named Minneapolis and St. Louis Railway Company hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of the State of Minnesota:

Now, therefore, the condition of this obligation is such that if the above-named Minneapolis and St. Louis Railway Company shall prosecute its said writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

220 THE MINNEAPOLIS & ST. LOUIS R'Y CO.,
By W. H. TRUESDALE, *Pres't.*
[SEAL.] JOS. GASKELL, *Secretary.*
WM. H. TRUESDALE.
JAMES D. SPRINGER.

Signed, sealed, and delivered in presence of—
—— ——.

STATE OF MINNESOTA, *County of Hennepin,* } *ss:*

William H. Truesdale and James D. Springer, being duly sworn, depose and say and each for himself saith that he is worth the sum of four thousand ($4,000) dollars over and above all his just debts and liabilities in unencumbered property in the State of Minnesota subject to execution.

WM. H. TRUESDALE.
JAMES D. SPRINGER.

Subscribed and sworn to before me this 2nd day of August, A. D. 1889.

[SEAL.] CHARLES H. SMITH,
Notary Public, Hennepin County, Minnesota.

I hereby approve the foregoing bond and sureties this 5th day of August, 1889.

JAMES GILFILLAN,
Chief Justice Supreme Court, Minnesota.

221 [Endorsed:] 5699. Copy. M. & St. L. R'y Co. *vs.* Emmons. Bond. Filed Aug. 5, 1889. J. D. Jones, clerk.

222 *Schedule of Papers Included in the Return Hereunto Following.*

First. Record on first appeal.

(A.) Settled case or bill of exceptions.
(B.) Notice of appeal and appeal bond.
(C.) Points and authorities for appellant and respondent respectively.
(D.) Judgment of reversal.
(E.) Opinion of court.

Second. Record on second appeal.

(A.) Complaint, answer, and —.
(B.) Verdict.
(C.) Settled case or bill of exceptions.
(D.) Motions for new trial by each party.
(E.) Order denying motions for new trial.
(F.) Notices of appeal by both parties.
(G.) Points and authorities of each party.
(H.) Judgment of reversal.
(I.) Opinion of the court.

Third. Record on third appeal.

(A.) Complaint, answer, and reply.
(B.) Verdict.
(C.) Settled case or bill of exceptions.
223 (D.) Motion for new trial.
(E.) Order denying same.
(F.) Judgment.
(G.) Notice of appeal and appeal bond.
(H.) Points and authorities for each party.
(I.) Judgment of affirmance.
(J.) Opinion of the court.
(K.) Original petition for writ of error and order allowing writ.
(L.) Original writ of error and proof of service of same.
(M.) Original citation and proof of service of same.
(N.) Assignment of errors.
(—.) Copy of bond.

224 STATE OF MINNESOTA, } *ss:*
Supreme Court, }

I, J. D. Jones, clerk of the supreme court of the State of Minnesota, in obedience to the writ of error hereto attached, do hereby

certify and return that the above and foregoing is a full, true, complete, and accurate transcript and copy of the record, except filings on papers, &c., in the case of Henry G. Emmons, plaintiff, *versus* The Minneapolis & St. Louis Railway Company, defendant, together with the original petition for writ of error, the order of allowance of the writ of error, the original writ of error, the original citation and proof of service thereof, as full, true, complete, and accurate as the same remains of record and on file in my office, except as shown & noted in said transcript & as appears from annexed schedule.

In testimony whereof I have hereunto signed my name officially and affixed the seal of said supreme court of Minnesota the 4th day of October, A. D. 1889.

[Seal of the Supreme Court, State of Minnesota.]

J. D. JONES,
Clerk of Supreme Court, Minnesota.

Endorsed on cover: Case No. 13,850. Minnesota sup court. No. 240. The Minneapolis & St. Louis Railway Company, plaintiff in error, *vs.* Henry G. Emmons. Filed October 21, 1889.

14925364

Office Supreme Court U. S.
FILED.
MAR 24 1893
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

TERM NO. 240.

THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY,
PLAINTIFF IN ERROR.

vs.

HENRY G. EMMONS.

Brief for Plaintiff in Error.

ALBERT E. CLARKE,
For Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1892.

No. 240.

THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY
PLAINTIF IN ERROR,

vs.

HENRY G. EMMONS.

Brief for Plaintiff in Error.

STATEMENT OF THE CASE.

The defendant in error (the plaintiff in the court below), sued the plaintiff in error in the State district court for Freeborn county in the state of Minnesota, to recover damages alleged to have been sustained by defendant in error as owner and occupant of a farm through which plaintiff in error, a railway corporation, owns and operates an unfenced railroad.

The damages claimed are alleged to have resulted from the failure of plaintiff in error to build and maintain fences on each side of its road between the land constituting the railroad company's right of way, and the adjoining land owned and occupied by the defendant in error; and to build cattle guards where the railroad enters and leaves said land.

The defendant in error claims damages in his complaint, of three kinds: *First*, the danger and peril of his stock kept upon his adjoining land; *Second*, his annoyance and value of his time spent

in watching to prevent said stock from going upon the track; *Third*, the depreciation in the rental value of his adjoining land.

Said cause being duly called for trial in the district court of Freeborn county, Minnesota, at the November, 1885, term thereof, an order was duly made by said court dismissing the same upon the objection of defendant therein (the plaintiff in error) on the ground that the complaint did not state a cause of action (see pages 3, 4 and 5 printed record).

The defendant in error appealed from the order of dismissal to the supreme court of Minnesota, which last named court reversed the order of said district court (see pages 16 and 17 printed record) in October, 1886.

Said cause again came on for trial before said district court of Freeborn county, Minnesota, upon the issues tendered by the complaint and answer (which are found on pages 19 to 21 inclusive, printed record) and was duly tried by jury. Before any evidence was taken, the plaintiff in error objected to the reception of any evidence in said cause on the ground that the complaint did not state a cause of action, which objection being overruled, exception was duly taken (page 21 printed record). It was agreed that the cost of building and maintaining a lawful fence on the line between both sides of the railroad right of way and the land of defendant in error would have been one hundred and twenty-five dollars (printed record, pages 21 and 22).

Defendant in error then offered to prove the difference between the rental value of the premises, with the railroad fences lawfully constructed thereon, and the rental value of said premises without such fences. The plaintiff in error objected thereto that the evidence was incompetent and irrelevant, and did not tend to prove the proper measure of damages. Thereupon said court ruled that the measure of damages was the difference between the rental value of the premises with the railroad lawfully fenced, and the rental with the railroad unfenced, but that the damages could not in any event exceed the cost of building and maintaining such lawful fence.

To this ruling both parties excepted, plaintiff in error excepting to that part of the ruling which fixed the difference in rental value as the measure of damages. Defendant in error then proved the difference in rental value during the time in question to be one hundred and twenty-five dollars, the proof being received against

the objection of plaintiff in error (printed record, page 22, folio 49).

Defendant in error then offered to prove that the difference in rental value of the premises fenced and unfenced was one hundred dollars per year, and also offered to prove the actual damages sustained by him in protecting his crops and preventing his stock from getting upon the railroad track by reason of the failure of plaintiff in error to fence its track. To both of these offers the plaintiff objected and excepted as irrelevant and incompetent and not tending to prove the proper measure of plaintiff's damages. The objections were sustained by the court, and the evidence was excluded and exception taken (record, page 22.)

The plaintiff in error offered no evidence, and the district court having instructed the jury that the measure of the damages sustained by the defendant in error was the difference in the rental value of the premises with the railroad fenced, and the rental value of the premises with the railroad unfenced, not exceeding the cost of building and maintaining such fences during the time alleged in the complaint, and both parties having duly excepted to the instruction, the jury returned a verdict for the plaintiff (the defendant in error) for one hundred and twenty-five dollars (see page 23 printed record).

Both parties thereupon moved the court to set aside the verdict and to grant a new trial. Said motions were overruled and denied and each party appealed to the supreme court of Minnesota, from the order denying a new trial.

Said cause came on for hearing before the supreme court of Minnesota on said appeals at the October, 1887, term. On February 14, 1888, said supreme court filed an opinion in said cause by which it was decided by said state supreme court that the diminution of the rental value of the farm of defendant in error by reason of the failure of the plaintiff in error to fence its track on both sides, was the proper measure of damages, and the order of the district court refusing a new trial was duly reversed (printed record pages 43 to 45 inclusive) and subsequently a judgment reversing said order was duly entered (printed record pages 45 and 46).

Said cause again came on for trial in the district court of Freeborn county, Minnesota, upon the issues tendered by the pleadings, on the 16th day of September, 1888.

The defendant objected to the reception of any evidence under

the complaint, on the ground that the same does not state a cause of action, and on the further ground that the liability sought to be imposed on the defendant by virtue of the railroad-fencing statute of Minnesota, impairs the obligation of the contract embodied in defendant's charter, and is in violation of article one (1), section ten (10) of the Constitution of the United States, and on the ground that it is also in violation of the fourteenth (14th) amendment of the Constitution of the United States (printed record page 51, folios 113 and 114. The objection was overruled and exception duly taken. The court then permitted the defendant in error, against the objection of the plaintiff in error to introduce evidence tending to establish the three claims for damages set out in the complaint viz: danger and peril of his stock, annoyance and time in money spent in watching his stock; and depreciation in the rental val ue of the land. (Printed record, pages 51 to 70 inclusive. All the evidence introduced was duly objected to by the plaintiff in error at the time, on the ground that it was immaterial, incompetent and irrelevant, and the further ground that the liability sought to be imposed by the railroad-fencing statute of Minnesota, impairs the obligation of the contract embodied in the charter of the railroad company, and is in violation of article one, section ten of the Constitution of the United States, and the Fourteenth Amendment to the Constitution of the United States.

The defendant introduced no testimony, and the court instructed the jury that the measure of damages was the difference in the rental value of the farm in its unfenced condition and its rental value had the railroad been fenced (printed record page 68, folio 146, and page 69, folio 147) to which exception was duly taken; and refused to instruct at the request of plaintiff in error, that the defendant in error is not entitled to recover for any damages he might have suffered by reason of the neglect to fence having rendered it possible for stock to escape from the land (page 70, printed record) to which refusal exception was duly taken.

The jury returned a verdict against the plaintiff in error for one thousand dollars (page 70 printed record). A motion for a new trial was made and overruled; judgment was enter on the verdict (printed record, pages 75 and 76); appeal was duly taken to the supreme court of the state of Minnesota (printed record, page 76); and the judgment of the district court was in all things affirmed by the

state supreme court (printed record, pages 92 to 94 inclusive) and the Hon. J. B. Gilfillan, Chief Justice of the supreme court of Minnesota, thereupon allowed a writ of error bringing the record and proceedings before this court for review (printed record pages 94, 95 and 96).

ASSIGNMENT OF ERRORS.

(1.) The court erred in holding the plaintiff in error responsible in damages for the diminution in rental value of the abutting farm of defendant in error occasioned by the failure of plaintiff in error to fence its railway.

(2.) The court erred in holding that so much of chapter 24, General Laws of Minnesota for 1876, and chapter 73, general laws of Minnesota for 1877, as is held to impose responsibility upon plaintiff in error for damages for the diminution in the rental value of the farm of defendant in error occasioned by the failure of plaintiff in error to build or maintain the fence in question did not impair the obligations of the charter of the plaintiff in error, contrary to the clause of section 10, article one (1), of the Constitution of the United States, which prohibits any state from passing any law impairing the obligation of contracts.

(3.) The court erred in holding that so much of chapter 24 of the General Laws of Minnesota for 1876, and chapter 73, General Laws of Minnesota for 1877, as is held to impose responsibility upon plaintiff in error for damages for the diminution in rental value of the abutting farm of defendant in error occasioned by the failure of plaintiff in error to build and maintain the fence in question did not deprive the plaintiff in error of its property without due process of law, contrary to the 14th amendment to the Constitution of the United States.

(4.) The court erred in holding that so much of chapter 24, General Laws of Minnesota for 1876, and chapter 73, General Laws of Minnesota for 1877, as is held to impose responsibility upon plaintiff in error for damages for the diminution in the rental value of the abutting farm of defendant in error to build or maintain the fence in question did not deny to the plaintiff in error the equal protection of the laws, contrary to the 14th amendment to the Constitution of United States.

(5.) The court erred in holding that so much of chapter 24, Gen-

eral Laws of Minnesota for 1876, and chapter 73, General Laws of Minnesota for 1877, as is held to impose upon the plaintiff in error the duty of building or maintaining at its own sole expense and cost the fence in question, did not impair the obligations of its charter, contrary to that clause of section (10), article one (1), of the Constitution of the United States, which forbids any state from passing any law impairing the obligation of contracts.

(6.) The court erred in holding that so much of chapter 24 General laws of Minnesota for 1876, and chapter 73, General Laws of Minnesota for 1877, as is held to impose upon plaintiff in error the duty of building or maintaining at its own sole cost and expense the fence in question did not deprive plaintiff in error of its property without due process of law, contrary to the 14th amendment to the Constitution of the United States.

(7.) The court erred in holding that so much of chapter 24, General laws of Minnesota for 1876, and chapter 73, General Laws of Minnesota for 1877, as is held to impose upon plaintiff in error the duty of building or maintaing at its own sole cost and expense the fence in question did not deny to the plaintiff in error the equal protection of the laws, contrary to the 14th amendment to the Constitution of the United States.

(8.) The court erred in overruling the objections of plaintiff in error and in denying the motion of plaintiff in error to exclude the answers to the following questions;

First.—"I will ask you what the difference between the fair rental value of the premises described in the complaint with the railroad fences lawfully constructed thereon,and the rental value of said premises without such fences during the time alleged in the complaint."

Second.—"I will ask you what, in your opinion, would be the difference between the fair rental value of that farm with the railroad running across it, fenced with a substantial fence, as required by law."

Third.—"You have heard all the testimony. I will ask you what, in your opinion as a farmer, the difference in the fair rental value of that farm would be with the railroad fenced and without being fenced, as it was, per year from the time the railroad was built across it up to December 9, 1884."

Fourth.—"I will ask you what, in your opinion, would be the difference in the rental value of that farm with the railroad cross-

ing it as it does, fenced lawfully and without the fence, between the 15th day of October, 1879, and the 9th day of December, 1884."

(9.) The court erred in admitting over the objections of plaintiff in error and in denying the motion of plaintiff in error to exclude the following evidence:

"And I had to watch them or else they would get on the other people's land."

(10.) The court erred in refusing to instruct the jury as follows:

"The jury are further instructed that the plaintiff is not entitled to recover for any damages he might have suffered by reason of the defendant's act complained of herein having rendered it possible, if such is the case, for plaintiff's stock to escape *upon* his land."

(11.) The court erred in instructing the jury as follows:

"One way is to show what the property is used for, what it is used for in fact, and what use it may be put to, and taking all those facts together we arrive at the proximate rental value of the land."

(12.) The court erred in affirming the correctness of the decision of the trial court in overruling the objections of the plaintiff in error and in denying the motion of plaintiff in error to exclude the following evidence:

First.—"I will ask you what—the difference between the fair rental value of the premises described in the complaint with the railroad fences lawfully constructed thereon and the rental value of said premises without such fences during the time alleged in the complaint."

Second.—"I will ask you what, in your opinion, would be the difference between the fair rental value of that farm with the railroad running across it, fenced with a substantial fence, as required by law."

Third.—"You have heard all the testimony. I will ask you what, in your opinion as a farmer, the difference in the fair rental value of the farm would be with the railroad fenced and without being fenced, as it was, per year from the time the railroad was built across it up to December 9, 1884."

Fourth.—"I will ask you what, in your opinion, would be the difference in the rental value of that farm with the railroad crossing it, as it does, fenced lawfully and without the fence, between the 15th day of October, 1879, and the 9th day of December, 1884."

(13.) The court erred in affirming the correctness of the determination of the trial court in overruling the objections of the plaintiff in error and denying its motion to exclude the following evidence:

"I had to watch them or else they would get on the other people's land."

(14.) The court erred in affirming the correctness of the action of the trial court in instructing the jury as follows:

"One way is to show what the property is used for, what it is used for in fact, and what use it may be put to, and taking all these facts together we arrive at the proximate rental value of the land."

(15.) The court erred in affirming the correctness of the determination of the trial court in refusing to instruct the jury as follows:

"The jury are further instructed that the plaintiff is not entitled to recover for any damages he might have suffered by reason of the defendant's act complained of herein having rendered it possible, if such is the case, for plaintiff's stock to escape from his land."

(16.) The court erred in affirming the correctness of the decision of the trial court in admitting evidence over the objections of the plaintiff in error tending to show the diminution in the rental value of the farm of defendant in error occasioned by the failure of plaintiff in error to fence its railway and in overruling the motion of plaintiff in error to exclude the same.

(17.) The court erred in affirming the judgment of the trial court.

ARGUMENT.

I.

The highest court of the state of Minnesota has held in this case that a railway corporation is liable to the owner of land crossed by its unfenced road, for the difference between the rental value of such land with the railroad unfenced, and the rental value of the same land if the railroad were fenced; the diminution in rental value of the premises being fixed as the measure of damages for which a railway company is liable by reason of its failure to fence its track.

Does the rule stated impair the obligation of the contract embodied in the charter of the plaintiff in error, and is it in violation of the Constitution of the United States?

The Fourteenth Amendment to the Federal Constitution provides "nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

A corporation is a person within the meaning of this amendment and is included in the phrase quoted.

Santa Clara County vs. Southern Pacific R. R. Co., 118 U. S. 394.

Pembina Mining Co. vs. Pennsylvania, 125 U. S. 181.

Beckwith vs. Railway Company, 129 U. S. 26.

The enforcement of this rule of damages necessarily deprives the railway company of its property, which must be in part devoted to making compensation to the land owner.

The question then presented is whether the payment of such damages can be required or enforced by virtue of any rule or law.

It is conceded that the plaintiff in error would not be liable at common law for damages of this character, all damage and injury to the realty being presumed to be compensated by the consideration for the conveyance of the right of way by the defendant in error.

The statutory liability is measured by the provisions of sections fifty-four, enacted in 1876 (being Chap. 24, Gen. Laws 1876), and fifty-seven, enacted in 1877 (being Chap. 73, Gen. Laws 1877) of chapter thirty-four of General Statutes of Minnesota, which sections are as follows:

"Sec. 54.—All railroad companies in this state shall, within six months from and after the passage of this act, build, or cause to be built, good and sufficient cattle guards at all wagon crossings, and good and substantial fences on each side of said road."

"Sec. 57.—Any company or corporation operating a line of railroad in this state, and which company or corporation has failed or neglected to fence said road, and to erect crossings and cattle guards shall hereafter be liable for all damages sustained by any person in consequence of such failure or neglect."

Two questions arise upon the consideration of this statute. *First*, whether the ruling of the state court presents a federal question; *second*, whether such ruling is in conflict with the Constitution.

If the question presented is simply one of the correctness of the construction of a state statute by a state court, it is not one to be successfully urged upon the consideration of this court. If, on the other hand, the statute is one which does not and cannot *admit* of any such construction, and the statute has only been made use of as a vehicle to establish a rule of law which is wholly unwarranted and was not and could not have been contemplated by the legislature enacting it, the question as to the validity of the rule, measured

by the language of the constitutional provisions may be fairly presented.

The bare fact that there is *some kind* of a statute providing for the recovery of damages resulting from failure to fence, does not authorize a court to create and enforce a rule of damages wholly unknown to the law and assume such action to be a construction of the statute.

The statute does not assume to create or provide for any other or different rule or measure of damages than already existed. It does not declare *any* rule, but affords a remedy by which recovery may be had for such general damages as might lawfully be recovered under statutes *of that kind and class*.

It is our claim that the state court has not confined itself to fixing a rule by which the *amount* of recoverable damages is to be determined, but has attempted to authorize a recovery upon a theory not only unknown to the law, but not tolerable under statutes of this character. In other words, the fact of the existence of a statute authorizing the recovery of *proper* damages has been used to excuse the creation of an entirely new rule or measure of damages.

The limit of the enforcement of the statute is its necessity as a police regulation, and any attempt to enforce it beyond this limit is unconstitutional.

The railroad-fencing statutes, as applied to corporations whose charters are silent on the question of fencing can only be upheld as an exercise of the police power of the state.

Gilman vs. Railway Company, 26 Minn. 268.
Smith vs. M. & St. L Ry. Co., 37 Minn. 103.

The purpose of the statute was to prevent domestic animals from coming on the track, and the consequent dangers to the animals themselves, and to passengers and employes on railway trains. Its object is to inclose the roads so that cattle cannot get upon them, and not to benefit the lands through which it passes, nor to provide a law for the construction of division fences between adjoining owners.

Filzgerald vs. Railway Co., 29 Minn. 336-340.
Emmons vs. Railway Co., 35 Minn. 503.
Fleming vs. Railway Co., 27 Minn. 113.
Nelson vs. Railway Co., 30 Minn. 74.

Payment of damages is never imposed upon any citizen of the United States except for affirmative wrong or neglect of duty. If a railway company is liable to the owner of a farm by reason of the diminution of rental value of that portion of the farm which remains after carving out the right of way, because the same is not fenced, it is because the law imposes upon the railway company the duty of fencing *for the land owner's benefit.* If the purpose of the statute is to prevent the killing of stock, its requirements are met when the stock killed is paid for. If the purpose of the statute is to protect passengers and employes upon trains, such requirement is not met by the payment of damages for diminished rents to the adjoining land owners. Yet the purposes enumerated are, by the highest court of Minnesota, declared to be the only purposes of the statute.

If the railway company is liable to an adjoining land owner for damages resulting to such land owner by reason of the failure of the company to fence the land owner's property and construct a partition fence, then the plaintiff in error is liable; but the highest court of Minnesota has held that such is *not* the purpose of the statute. The duty imposed upon the railway is to inclose its own road, not to inclose the adjoining farm.

Smith vs. Railway Co., 37 Minn. 103.

If the statute was never intended and cannot be intended to provide a means of compensating the land owner for failure of the railway company to fence his farm for him, then there is no law which authorizes the appropriation of the property of plaintiff in error to that use and "due process of law" is wanting.

In this case the right of way of the railroad over this land is one hundred feet wide, and the title of the railroad company is a title in fee simple evidenced by warranty deed from the defendant in error (printed record, page 51, folio 114.) Had the company built a fence on each side of the track at the uniform distance of fifteen feet from the center line, the requirement of the statute would (under the ruling of the state supreme court) have been fully met both technically and substantially. By what rule can it then be held that this plaintiff in error is obligated to build a partition fence between its land and the land of the defendant in error.

All diminution in value of the adjoining land is compensated either by consideration paid for the conveyance of the land purchased for right of way, or in case of condemnation, by payment of

the award of the right of way commissioners. It is the duty of the commissioners to include all damages to adjoining lands, and the law presumes that in case of conveyance by deed, full compensation is made by payment of the consideration.

The highest court of Minnesota having declared the statute to be a police regulation and not to be a partition fence law, nor for the benefit of the land owner, by what law or rule of law is the liability or obligation created? If neither common law or statute afford a basis for such a rule of damages, wherein can the courts find a warrant for the appropriation of our property to the payment of these damages?

So far as the object and purpose of the statute come within reasonable police regulation, it can be enforced as such. Any construction, however, of the statute which extends its operation beyond what is necessary as a police regulation or to effect purposes which are not in themselves police regulations, is a violation of the Constiution.

Tiedman on Limitations of Police Power. Sec. 584.
Cooley's Constitutional Limitations, Sec. 578.
Sedgewick on Constitutional Law, 434-439.

The supreme court of Minnesota has construed this statute in its decisions heretofore cited, and it is in reliance upon such construction that we assert the rule of damages established in this case to be a violation of the constitution. It being conceded that the purpose of this police requirement is to prevent stock from going upon the track, and to preserve the lives of those who are upon the moving trains, as asserted by the state court; and conceding that it is not the purpose of the statute to require railway companies to construct partition fences for the benefit of the adjoining land owner (as has also been decided by such court,) it necessarily follows that such land owner cannot urge the statute as the base of a claim for damages to his real estate by reason of the non-construction of a fence between the right of way and his farm.

The rule of damages adopted finds no basis upon which to rest either at common law or in statutory enactment. The statute cited has no application to the subject of the decision and affords it no support. There can be no "construction" of a statute which does not exist. No statute exists, in Minnesota, which purports to go beyond an exercise of the police power of the State, to compel rail-

roads to keep stock off their tracks. No statute exists which purports to authorize the recovery of damages for diminished value of real estate crossed by railroads, other than the statute providing for the exercise of the right of eminent domain in the original acquisition of the right of way. A statute defining the crime of assault would furnish no justification for a conviction of larceny. No more can a statute establishing a police regulation justify or sustain a judgment for damages resulting from failure to construct a partition fence.

II.

IS THE DECISION WITHIN THE CONSTITUTIONAL PROHIBITION?

We urge the claim that the statute affords no ground for the rule of damages established by the decision of the Minnesota court, and thereby concede the rule to be the creation of a court and not of the legislature; but we submit that, to so construe a principle or rule of law, not resting on statute, in such a manner as to deprive a suitor of a constitutional right, is tantamount to making a law taking away such right. The powers of Government are vested in three co-ordinate departments, Legislative, Executive and Judicial, and through one or more of these departments all such powers must be exercised. The acts of these departments within their proper jurisdiction are of equal authority, and are limited only by the constitution. The decision of any one of these several departments upon any question within its jurisdiction is final, and when rendered, furnishes or establishes a "law" or rule of conduct by which the rights of all citizens of the state are measured. Such being the effect of a decision, it is immaterial by which department it may be made; the act of each department being the act of the state, and the effect of such decision, to make a law binding upon all citizens. If the law thus made violates any provision of the Federal Constitution it is void. It cannot be consistently claimed that a *court* may establish a rule destructive of a constitutional right, while a statute declaring the same rule would be void. It is the right which is guaranteed by the constitution, and this right is inviolable, as well by the courts as legislatures.

The proposition that a law may be made by a judicial decision as well as by legislative enactment, is recognized in the following cases:

Virginia vs. Rives, 100 U. S. 318.
Township of Pine Grove vs. Talcott, 19 Wall. 677-678.
Chicago vs. Sheldon, 9 Wallace, 55-56.
The City vs. Lamson, 9 Wallace, 486,
Gelpecke vs. City of Dubuque, 1 Wallace. 206.
Ohio Life Ins. Co. vs. Debolt, 16 How. 432
Douglas vs. County of Pike, 11 Otto, 687.
Taylor vs. Ypsilanti, 15 Otto, 71-72.
Burtz vs. City of Muscatine, 8 Wall. 584.
Burgess vs. Seligman, 107 U. S. 20.

III.

The duty imposed upon railroads by this statute is a duty to the public. The fencing of the track is for the protection of passengers and employes upon railroad trains. Not being intended to serve the purpose of a partition fence law, non-compliance with its provisions constitutes no violation of a private duty to a particular land owner. The statute imposes no duty which is not common to all owners of real estate in the vicinity of railroads, whether or not their property abuts upon the railroads. It is as much the duty of a railroad company to protect its track from incursions by stock belonging to the proprietors of land situated forty rods from the road, as from that belonging to adjoining land owners. A particular land owner, though his land abut upon the right of way, has no personal or private right in the construction of the fence as distinguished from the general public, and can maintain no personal action against a railway company for its violation of this public duty.

Dawson vs. St. Paul, 15 Minn., 136.
Rochette vs. Railway Co., 32 Minn., 201.
Shero vs. Cary, 35 Minn., 423.

If the statute confers upon abutting land owners the right to recover from railroad companies, damages to compensate them for the diminution in rental value of their lands, and refuses the same right to the owners of unfenced lands in the immediate vicinity, but not abutters, whose stock may stray upon the track, it is in violation of the constitutional provision which guarantees to every one equal rights and privileges.

Cooley's Constitutional Limitations, Sec. 392.
Durkee vs. City of Janesville, 28 Wis., 464.
In re Parrott, 1 Fed. Rep., 481.
Holden vs. James, 11 Mass., 236.

Nor can all landowners recover damages, because, as we have shown, those damages have been sustained by them only as members of the body politic.

The railroad fence law is penal in its character because it is aimed at a certain class of corporations and is derogatory to the rights of the corporation.

Sprague vs. Birdsell, 2 Cowen, 419.

Because it is in derogation of the common law and the property rights of the corporation.

Sharp vs. Spier, 4 Hill, 76.

Penal laws must be strictly construed, and the general words "all damages" in section 57 must be restricted to the application necessary to accomplish the purposes of the statute.

IV.

The rule of damages declared by the state court is a law impairing the obligation of the contract between the state and the plaintiff in error, embodied in the charter of this company.

The plaintiff in error is a corporation created by an act of the legislature of the territory of Minnesota, approved March 3, 1853, entitled "An act to incorporate the Minnesota Western Railway Company." There are no express words stating whether the act is a public or private statute.

An act of the legislature which creates a highway or railway corporation is a public act.

Smith's Com., 802-809, and cases cited.

This act was recognized as existing by chapter 65 of the laws of 1855, which is a public statute, and thereby the original became a public statute.

Roger's case, 2 Greenl. Rep. 301.
Samuel vs. Evans, 2 D. & D. 569.

The legislature, by chapter 57 Special Laws of Minnesota for 1870, authorized the Company to change its name, and subsequently the state legislature by chapter 113, Special Laws of 1881, recog-

nized the fact that the name of the corporation had been changed to "The Minneapolis & St. Louis Railway Company."

The several statutes creating this corporation have been recognized as public acts by the Supreme Court of Minnesota.

Brakken vs. M. & St. L. Ry. Co., 29 Minn. 41, 44.

It was not, however, necessary for the plaintiff in error to prove that its charter antedated the statute. The claim of the defendant in error being based upon statutory liability, he is bound to prove that the statute is applicable and that the charter is subsequent and subject to the statute. No claim is made that the charter contains any provision obligating the company to construct fences. The fact that the claim rests wholly upon statutory liability negatives the existence of charter liability. The statutes creating the corporation are all silent on the subject of fencing. No duty imposed by our charter requires us to build partition fences between our land and that of the adjoining proprietors. The duty does not exist at common law.

Ward vs. Railway Company, 4 Fed. Rep. 862.

We think it must be conceded that our rights and obligations must be measured by the provisions of our charter and the law of the state as existing at the time of our incorporation.

We concede that the contract embodied in such laws does not exempt us from liability to police regulation, but insist that the limit of this statute as a police regulation is, as properly defined by the Supreme Court of Minnesota, the requirement *that we inclose our track*; and does not extend to the restraint by us, of the stock of adjoining landowners within the limits of their respective farms, nor within any limits; neither does it extend to an undertaking that the rental value of their holdings shall remain undimished.

When we purchased the right of way we made compensation for all elements of damage then known to the law.

Subsequent to its acquirement for a consideration then adequate to compensate all damages then recoverable, the legislature enacted a law purporting to afford a new remedy and to add a new element of damage to those already existing. Such a statute cannot have a retroactive effect, nor have the effect to reopen every condemnation proceeding or conveyance of land acquired for railroad use and compel corporations to make increased compensation for land already acquired and paid for.

One committing an act which is not when committed a violation of law, cannot be punished for such act under a law subsequently enacted declaring it wrongful.

A railway corporation buying land for railway use and making full compensation for all damages known to the law, cannot be further mulcted by virtue of the provisions of a subsequent law creating a previously unknown element of damage. This plaintiff in error acquired, under its charter, the right *as against the individual land owner* to operate an unfenced railroad across this land. *As to the public*, it must comply with the *police regulation* requiring it to *keep stock off its track*, to the end that the traveling public may be ensured protection.

The charter and the law are our contract. An act of incorporation, either for public or private purposes, is both in form and substance a contract. Rights legally vested in a corporation cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved in the act of incorporation. Remote and consequential injuries by reason of the construction of railroads will not furnish a cause of action against those who are authorized by the legislature to accomplish such object.

Bailey vs. Railroad Company, 4 Harrington, 385 and cases cited.

Any construction of the statute in question which gives it effect except as a police regulation, brings it in conflict with the provisions of the Federal Constitution. Limited to the office of such regulation, it furnishes no support for the decision of the state court.

Respecfully submitted,

ALBERT E. CLARKE,
For plaintiff in error.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM NO. 240.

THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY,

PLAINTIFF IN ERROR,

vs.

HENRY G. EMMONS,

DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

EDWARD J. HILL,
For Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

THE COUNTRY PRINTERS, ALBERT LEA, MINN.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

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THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY,

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BRIEF FOR DEFENDANT IN ERROR.

This controversy arises upon a writ of error to the Supreme Court of Minnesota to review a final judgment of that court, challenged here, upon the contention that its construction of a state statute is inimical to the fourteenth amendment of the Federal Constitution.

In common with most of its sister states of the Union, Minnesota has attempted to secure reasonable protection for the traveling public as well as railway employes who ride on trains, by the enactment of statutes requiring all railroads within the

state to fence their tracks and construct cattle guards at highway crossings which object is sought to be accomplished by authorizing actions for damages to those who suffer injury by reason of non-compliance with the statutory provisions.

The statute under which the recovery in the State Court was obtained is an amendment to an act adopted in 1876 which originally read as follows:

Section 1. All railroad companies in this State shall, within six months from and after the passage of this act, build or cause to be built, good and sufficient cattle guards at all wagon crossings, and good and substantial fences on each side of such road.

Section 2. All railroad companies shall be liable for domestic animals killed or injured by the negligence of such companies; and a failure to build and maintain cattle guards and fences as above provided, shall be deemed an act of negligence on the part of such companies.

* * * * * * * *

Section 4. Any company or corporation owning and operating a line of railroad within this State, and which company or corporation has failed and neglected to fence said road, and to erect crossings and maintain cattle guards, as required by the terms of its charter, and the amendments thereof, shall hereafter be liable in case of litigation, for treble the amount of damages suffered by any person, in consequence of such neglect, to be recovered in a civil action; or actual damages if paid within ten days after notice of such damages.

Chapter 24, General Laws Minn. 1876.

The provisions above quoted embrace all of the enactment referred to, bearing upon the questions involved.

This statute clearly authorized damages to the owner of cattle killed to the extent of the value of such cattle with costs, but was found ineffectual to accomplish the purposes intended

(the building of the fences by the railway company) and section 4 of the act of 1876 was in the following year amended so as to read as follows:

Section 4. Any company or corporation operating a line of railroad in this State, and which company or corporation has failed or neglected to fence said road and to erect crossings and cattle guards, and maintain such fences, crossings and cattle guards, shall hereafter be liable for all damages sustained by any person in consequence of such failure or neglect.

Chapter 73, General Laws Minn. 1877.

General Statutes Minn. 1878, Chapter 34, Section 57.

The defendant in error recovered a verdict in the state court for damages which he had sustained by reason of the neglect of the plaintiff in error to comply with the provisions of the statute as amended, upon the proofs, under allegations properly pleaded that he was the owner of a valuable farm in Freeborn county which he had cultivated and enclosed with fences; such farm was peculiarly adapted to raising stock and general farming; he had used it for that purpose many years and could not enjoy its beneficial use in any other way. For a number of years previous to the commencement of the action the railway company—plaintiff in error, had operated its road and run trains through the farm without building the proper fences on either side of its track or constructing cattle guards at the highway crossings which were situated at the points where the railroad entered and left the same, and the defendant in error was obliged, at considerable expense, to herd and watch his cattle for several years before the commencement of suit, to keep them from being killed by passing trains, which subjected him to great inconvenience, and deprived him of the free use and enjoyment of his land, imposed an aggravating nuisance upon his property, diminished the value of its use, and under his claim entitled him to damages for the diminution of its rental value. These facts constituting the basis of the

recovery are fully established, as appears by the record in this Court.

See complaint in printed record, pages 49, 50 and 51.

See evidence in settled case, printed record, pages 51 to 67 inclusive.

The right to recover in such a case was first raised by a general objection to the sufficiency of the claim for any damages of the nature sought to be enforced, upon which issue taken by appeal to the Supreme Court of Minnesota.

Emmons vs. M. & St. L. R'y Co., 35 Minn. 503.

It was held *inter alia*, the learned Chief Justice delivering the opinion of the Court, that the language of section four as amended covered "damages to an abutting farm by exposing animals pastured or kept on it to the dangers of an open railroad, thus rendering it less valuable for the puspose of raising or pasturing animals than it would be if the railroad were fenced as required by the statute," and further, "the object is not to benefit the lands—that is to improve and render them more valuable—but to prevent, as far as possible, injury to them from maintaining and operating a railroad through or along side of them. That a farm through which or along which a railroad runs is less valuable by reason of the road being without fences than it would be if the road were properly fenced must be apparent to anyone".

And again, "to regulate the carrying on of any business liable to be injurious to the property of others, like that of operating a railroad, so that it shall do the least possible injury to such property, is as much within the police power of the State as regulating it with a view to protect life from its dangers. There can be no doubt that the State may, under that power, require railroads to be so constructed, maintained, and operated and so protected and inclosed, that they will injure as little as

possible the farms or lands through or alongside of which they run."

The entire opinion of the learned Chief Justice above cited deserves to be considered as a close and careful exposition by the Minnesota court of its own statute as well as a most satisfactory answer to the theory of counsel for plaintiff in error. After the trial of the issues in the district court for Freeborn county subsequent to the review of the legal question involved in the case last cited, defendant in error obtained his verdict and the cause was again taken to the supreme court of the State and the objection urged in this court that its interpretation of the statute denied to the railroad company the equal protection of the laws was again urged upon that court which held that damages of the nature claimed might be recovered under the statute, and upon the constitutional issue uses this language: "We do not propose to re-enter upon a discussion of the question further than to say that we think the fallacy of counsel's argument consists in assuming that, because the statute requiring railways to fence their roads is a police regulation, the object of which is to prevent animals from getting upon the track, and the consequent danger to the animals themselves and to railway passengers and employes, therefore it is in excess of the police power of the state to impose any liabilities for non-compliance with the law other than for resultant injuries to animals and railway passengers and employes. The police legislation of the country abounds in the imposition of penalties and liabilities, beyond such resultant injuries, as a means of enforcing strict compliance with the statute; and we know of no means more likely to insure prompt obedience to the requirements of this "fence law" than the provisions of section 57, as construed in the Emmons case." (Mitchell, J.)

Nelson vs. M. & St. L. Ry. Co. 41 Minn. 131.

See Record, page 92.

It seems to us difficult to add anything to the force of the reasoning of the state court of Minnesota to illustrate the necessity of the statute or its application of the remedy given by it for the injuries sustained.

It may be pertinent, however, and not inappropriate to call attention to the decisions of this court, upon analogous questions to the issue discussed by counsel for plaintiff in error.

Such legislation as this statute of Minnesota is not novel or peculiar in its character, but has existed almost from the very beginning of the railroad service and in a very early case was held to be within the proper exercise of the police power of the States.

Thorpe vs. R. & B. Ry. Co., 27 Vt. 140.

The conclusions in the above case in favor of the existence of such a power over the subject matter has never been successfully answered. The doctrine of that case has received the express sanction of this court in one of the great historical legal questions based upon the exercise by the state of the right to regulate domestic affairs in favor of the public welfare.

Slaughter House cases, 16 Wallace 36.

The purpose of the legislature of Minnesota was to secure a desireable end by appropriate legislation; the neglect of the railroad company to build fences and cattle guards unquestionably adds to the dangers incident to the hazardous business of operating railroads. Passengers on their trains, as well as their employes, are subjected by such neglect to the greatest danger conceivable, which may be occasioned by the straying of cattle upon the railway track unless prevented by such practical means as the statute provides for. The wrecking of trains and consequent loss of life was undoubtedly the primary consideration of the legislature, to which the loss to the owner of the cattle injured, whose well known propensity

to stray upon railroad tracks where they are liable to be run upon and occasion disaster, is incident.

The object of the Minnesota statutes is clearly within the scope of the state's exercise of its police powers and it is not now an open question in this court that private individuals who sustain peculiar damages by the violation of the duty expressed in the legal maxim, "*Sic utere tuo ut alienum non laedas,*" may be authorized by appropriate legislation to obtain redress in the courts by civil action and statutes providing for such liability if general in their application do not deny to the persons upon whom such liability is imposed the equal protection of the laws.

Hackett vs. Smelsley, 77 Ills. 109.
Woolbeater vs. Risley, 38 Iowa, 486.
Schneider vs. Hosier, 21 Ohio St. 98.
Kreiton vs. Nichols, 28 Mich., 496.
Stanton vs. Simpson, 48 Vt., 628.
State vs. Ludington, 33 Wis., 107.
Wightumn vs. Devere, 33 Wis., 570.
Beclare vs. Newton, 54 N. H., 117.
Bertholf vs. O'Reilly, 74 N. Y., 509.
Slaughter House Cases, 16 Wall. 36.
Munn vs. Illinois, 94 U. S., 113.
Barbier vs. Connolly, 113 U. S., 27.
Soon Hing vs. Crowley, 113 U. S., 703.
Mugler vs. Kansas, 123 U. S., 623.
Sands vs. Manistee Co., 123 U. S., 288.
Nashville etc. R. R. Co., vs. Alabama, 128 U. S., 96.
Missouri R. R. Co, vs. Mackey, 127 U. S., 205.
Dent vs. West Virginia, 129 U. S., 114.
Minneapolis R'y Co., vs. Beckwith, 129 U. S., 26.
People vs. Squire, 145 U. S., 175.

Plaintiff in error attempts to distinguish its claim in this case from the authorities referred to upon the theory as we understand it, that while damages to cattle owners for loss of stock

or to passengers may be authorized yet other damages such as the injury to the land owner by the maintenance of the nuisance (an unfenced railroad) through his land is such an arbitrary and unwarranted exercise of the police power that it violates the spirit of the Federal Constitution.

We fail to see any difference whatever in the application of the principle which recognizes one element of damage and arbitrarily ignores other legal elements of injury different perhaps in some respects but quite as substantial in effect upon the person who suffers the wrong.

The operation of the railway through the farm of defendant in error in violation of the police regulation requiring its tracks to be fenced, to the inconvenience and injury of the land owner in his enjoyment of his property, upon well understood principles recognized by all courts, constituted a nuisance.

Fertalizing Co. vs. Hyde Park, 97 U. S., 659.

Commonwealth vs. Alger, 7th Cush., 84; and authorities previously cited.

And the defendant in error having sustained special damages from such nuisance may maintain his action for such special damages.

Georgetown vs. Alexandria Canal Co., 12 Pet., 91.

Miss. & Mo. R. R. Co. vs. Ward, 2 Black 485.

Penn. vs. W. Bridge Co., 13 How. 518.

The evidence in this case contained in the record clearly establishes the fact that the defendant in error sustained an injury to his property rendering its use less valuable and the occupation physically uncomfortable, inconvenient and injurious to him, for which, upon an elementary rule recognized by this court he would be entitled to have his damages assessed by a jury.

Baltimore etc. R. R. vs. Fifth Baptist Church, 108 U. S. 318.

Much that has been urged above would more properly

apply if this were an original review of the exceptions reserved on the trial of the case in the state court. But the rules of evidence and the measure of damages adopted by the Minnesota Supreme Court are not the subjects of discussion or inquiry on this writ of error.

Morrow vs. Brinkley, 129 U. S., 178.
Lent vs. Tillson, 140 U. S., 316.

And the construction of the state statute in which it goes no farther than to declare what are the elements of damage for its violation is to be accepted as conclusive in this Court.

Amy vs. Watertown, No. 1, 130 U. S. 301.
Louisville, etc. vs. Mississippi, 133 U. S., 587.
In re Duncan, 139 U. S., 449.

Exactly how the imposition of compensatory damages in a civil action after verdict by a court of competent jurisdiction for the neglect of a plain and wholesome duty imposed by the State upon principles recognized by the common law, can be said to impair the obligation of any contract or deprive the plaintiff in error of his rights without due process of law or in any way deny to it the fair protection of the laws we are entire-at a loss to determine.

The far-fetched theory, that the statute was not enacted to provide for partition fences and the supposition that plaintiff in error might have complied with the statute by building a fence nearer the tracks than the line between the landowner and the railway company which seems to be the main suggestion of counsel is not pertinent. It was not for the railroad company to avoid a compliance with the statute by a subterfuge, but to fence its track in a sufficiently practical manner to keep cattle from straying upon it, and a careful perusal of the brief of the plaintiff in error the argument of its counsel in the record as well as that offered in this court only serves to emphasize what we have had occasion heretofare to characterize as its fatal

fallacy—the attempt to make suppositions and theories subserve a compliance with the statute and answer the purpose of fence posts and barbed wire. This cannot be done.

We respectfully submit that the decisions of the Supreme Court of Minnesota in this and the case following—*Minneapolis & St. Louis Railway Company, plaintiff in error, against Ole Nelson, defendant in error*—brought by writ of error into this Court and involving the same questions are right and should be affirmed.

Edward J. Hill.

Attorney for Defendant in Error.